# APPENDIX

DEC 20 1973

In The

# Supreme Court of the United States

October Term, 1973

No. 73-1713

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Secretary of the Navy,

*Appellant*

—v.—

Mark Avrech

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On Appeal From The United States Court of Appeals
For The District Of Columbia Circuit

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Jurisdictional Statement Filed June 15, 1973
Probable Jurisdiction Noted October 9, 1973

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# Supreme Court of the United States

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*Appellant*

—v.—

MARK AVRECH

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## RELEVANT DOCKET ENTRIES

| DATE | PROCEEDINGS |
|---|---|
| | U.S. DISTRICT COURT |
| Dec. 16, 1970 | Complaint, appearance filed |
| Mar. 8, 1971 | Motion of plaintiffs for summary judgment; memorandum; statement; exhibits A & B; affidavit. filed |
| Apr. 22, 1971 | Motion of defendant to dismiss or in the alternative, for summary judgment and opposition to plaintiff's motion for summary judgment; exhibit A; A-1; & B statement; P & A; in support of defendant's motion to dismiss or in the alternative, for summary judgment; c/m 4-22 71; M.C. appearance of Thomas A. Flannery, Joseph M. Hannon & Michael A. Katz. filed |
| Apr. 22, 1971 | Objections of defendants to plaintiff's statement of facts in support of motion for summary judgment; c/m 4-22-71. filed |
| Apr. 22, 1971 | Motion of defendant to strike c/m 4-22-71. filed |
| June 30, 1971 | Reply of plaintiff to defendants memorandum of P&A in support of defendants motion to dismiss or in the alternative for summary judgment; c/m 6-30-71. filed |
| Aug. 6, 1971 | Supplement to defendants memorandum of P&A in support of motion to dismiss and opposition to plaintiff's motion for summary judgment; exhibits (4); c/m 8-6-71. filed |
| Aug. 17, 1971 | Order granting motion to strike affidavit of plaintiff in support of motion for summary judgment. (N) |

RELEVANT DOCKET ENTRIES—Continued

| DATE | PROCEEDINGS |
|---|---|
| Aug. 20, 1971 | Motion of plaintiff for summary judgment argued and denied; Motion of defendant for summary judgment argued and granted. (Order to be presented) |
| Aug. 27, 1971 | Order granting motion of defendant for summary judgment and denying motion of plaintiff for summary judgment. (N) |
| Sept. 1, 1971 | Notice of appeal by plaintiff from order of August 27, 1971. filed |
| Oct. 21, 1971 | Opinion and order denying motion of plaintiffs for summary judgment and granting motion of defendants for summary judgment. (N) |
| | U.S. COURT OF APPEALS |
| Mar. 20, 1973 | Judgment reversing judgment of the District Court. (n) |
| Apr. 5, 1973 | 4-Appellee's motion for leave to file a petition for rehearing and suggestion for rehearing en banc, time having expired (m-4) |
| Apr. 19, 1973 | 4-Appellee's notice of appeal from the judgment of this Court entered March 20, 1973 reversing the judgment of the District Court (m-19) |
| June 20, 1973 | 1-Notice of filing in the U.S. Supreme Court (m-18) |
| Oct. 15, 1973 | Certified copy of order of Supreme Court for the U.S. Court of Appeals that the statement of jurisdiction in this case having been submitted and considered by the court probable jurisdiction is noted |

## THE CHARGES AND SPECIFICATIONS AGAINST APPELLEE

* * * *

### CHARGES

Charge I: Violation of the Uniform Code of Military Justice, Article 80

Specification: In that Private First Class Mark S. AVRECH, U. S. Marine Corps, Headquarters and Maintenance Squadron 16, Marine Aircraft Group 16, 1st Marine Aircraft Wing, Fleet Marine Force, Pacific, Fleet Post Office, San Francisco, California 96602, did, at Marble Mountain Air Facility, Danang, Republic of Vietnam, on or about 15 April 1969, with design to promote disloyalty and disaffection among the troops, attempt to publish to members of the Armed Forces of the United States the following statement, to wit: "The Truth", Volume 1 Number 1, dated April 30, 1969: "I've been in this country now for 40 days and I still don't know why I'm here. I've heard all the arguments about communist aggression and helping the poor defenseless people. I've also heard this three years ago. The entire Vietnamese Army will switch to a pacification role in 1967 and leave major fighting to the American troops. (Statements by South Vietnamese Foreign Minister, L.A. Times, Nov. 18, 1966.) It seems to me that the South Vietnamese people could do a little for the defense of their country. Why should we go out and fight their battles while they sit home and complain about communist aggression. What are we cannon fodder or human beings? If South Vietnam was willing to go it on their own back in 1964 what the hell is the matter with them now? The United States has no business over here. This is a conflict between two different politically minded groups. Not a direct attack on the United States. It's not worth killing American boys to have Vietnam have free elections. (Former Vice President Richard M. Nixon, L. A. Times, Dec. 31, 1967.) That was our present leader of this country and now he has the chance to do something about the situation and what happens? We

have peace talks with North Vietnam and the V. C. That's just find and dandy except how many men died in Vietnam the week they argued over the shape of the table? Why does this country think that it can play games with peoples lives and use them to fight their foolish wars I say foolish because how can you possibly win anything like a war by destroying human lives. Human lives that have no relations at all to the cause of the conflict. Do we dare express our feelings and opinions with the threat of court-martial perpetually hanging over our heads? Are your opinions worth risking a court-martial? We must strive for peace and if not peace then a complete U. S. withdrawal. We've been sitting ducks for too long." * * * * * * * "SAM", or words to that effect, which statement was disloyal to the United States.

ADDITIONAL Charge I: Violation of the Uniform Code of Military Justice, Article 134

Specification: In that Private First Class Mark S. AVRECH, U. S. Marine Corps, Headquarters and Maintenance Squadron 16, Marine Aircraft Group 16, 1st Marine Aircraft Wing, Fleet Marine Force, Pacific, Fleet Post Office, San Francisco, California 96602, did, at Marble Mountain Air Facility, Danang, Republic of Vietnam, on or about 15 April 1969, with design to promote disloyalty and disaffection among the troops, published to members of the Armed Forces of the United States the following statement, to wit: "The Truth", Volume 1 Number 1, dated April 30, 1969: "I've been in this country now for 40 days and I still don't know why I'm here. I've heard all the arguments about communist aggression and helping the poor defenseless people. I've also heard this three years ago. The entire Vietnamese Army will switch to a pacification role in 1967 and leave major fighting to the American troops. (Statement by South Vietnamese Foreign Minister, L. A. Times, Nov. 18, 1966.) It seems to me that the South Vietnamese people could do a little for the defense of their country. Why should we go out and fight their

battles while they sit home and complain about communist aggression. What are we cannon fodder or human beings? If South Vietnam was willing to go it on their own back in 1964 what the hell is the matter with them now? The United States has no business over here. This is a conflict between two different politically minded groups. Not a direct attack on the United States. It's not worth killing American boys to have Vietnam have free elections. (Former Vice President Richard M. NIXON, L. A. Times, Dec. 31, 1967.) That was our present leader of this country and now he has the chance to do something about the situation and what happens? We have peace talks with North Vietnam and the V. C. That's just fine and dandy except how many men died in Vietnam the week they argued over the shape of the table? Why does this country think that it can play games with peoples lives and use them to fight their foolish wars I say foolish because how can you possibly win anything like a war by destroying human lives. Human lives that have no relations at all to the cause of the conflict. Do we dare express our feelings and opinions with the threat of court-martial perpetually hanging over our heads? Are your opinions worth risking a court-martial? We must strive for peace and if not peace then a complete U. S. withdrawal. We've been sitting ducks for too long. * * * * * * * * SAM**", or words to that effect, which statement was disloyal to the United States.

* * * *

# SUPREME COURT OF THE UNITED STATES

## No. 72-1713

SECRETARY OF THE NAVY, APPELLANT

v.

MARK AVRECH

APPEAL from the United States Court of Appeals for the District of Columbia Circuit.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

October 9, 1973

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# In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

SECRETARY OF THE NAVY, APPELLANT

*v.*

MARK AVRECH

*ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## JURISDICTIONAL STATEMENT

### OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 13–26) is not yet reported. The oral opinion of the district court delivered on August 20, 1971 (App. B, *infra*, pp. 27–28) is not reported. The written opinion of the district court filed on October 21, 1971 (App. C, *infra*, pp. 29–34) is not reported.

### JURISDICTION

Appellee Mark Avrech ("Avrech") brought this civil action in the United States District Court for the District of Columbia in reliance on 5 U.S.C. 701–706, 28 U.S.C. 1331 and 1361, and D. C. Code (1961 ed., Supp. V) 11–521, challenging the validity of his court-martial conviction under Article 134 of the Uniform Code of Military Justice, 10 U.S.C. 934. He sought an

order against the Secretary of the Navy ("The Secretary") requiring him to expunge the conviction from Avrech's military records and granting him back pay and other lost benefits. The district judge granted the Secretary's motion for summary judgment on August 27, 1971, and Avrech appealed.

On March 20, 1973, the United States Court of Appeals for the District of Columbia Circuit entered a judgment of reversal (App. D, *infra*, p. 35), together with an opinion holding that Article 134 is unconstitutionally vague. A notice of appeal to this Court (App. E, *infra*, p. 36) was filed with the court of appeals on April 19, 1973. This Court has jurisdiction to review the decision of the court below by way of appeal pursuant to 28 U.S.C. 1252, since a court of the United States has entered a judgment in a civil action to which an officer of the United States is a party holding an Act of Congress unconstitutional. See Stern and Gressman, *Supreme Court Practice* § 2.5 (4th ed.).

STATUTE INVOLVED

Article 134 of the Uniform Code of Military Justice (10 U.S.C. 934) provides:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

## QUESTION PRESENTED

Whether the General Article of the Uniform Code of Military Justice, 10 U.S.C. 934, is unconstitutionally vague.

## STATEMENT

On June 24, 1969, appellee Mark Avrech, then a United States Marine serving on active duty in Vietnam, was tried by a special court-martial on charges of having violated Article 80 and Article 134 of the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. 880, 934 (the latter article known as the "General Article"). Article 80 provides for punishment of *attempts* to commit offenses otherwise punishable under the UCMJ, and Article 134, the General Article, proscribes, *inter alia*, "all disorders and neglects to the prejudice of the good order and discipline in the armed forces" and "all conduct of a nature to bring discredit upon the armed forces."[1] Although he was acquitted on the specification filed under the General Article itself, he was convicted on the specification drawn under Article 80, charging an attempt to commit the offense charged under the General Article, namely attempting to publish to members of the Armed Forces, "with design to promote disloyalty and disaffection among the troops," a certain statement disloyal to the United States.[2] The events leading to the conviction took place at Marble Mountain Air Facility, Danang, Republic of Vietnam, on April 15,

[1] A third clause referring to crimes and offenses not capital is not at issue in this case.

[2] The specification under the General Article alleged that he had completed the publication.

1969, while Avrech was on active duty in the combat zone.

Avrech had enlisted in the Marines in August 1967 and arrived in Vietnam as a private first class in February of 1969. While on night duty with the group supply offices at his base, he typed up a stencil criticizing American involvement in Vietnam and advocating a withdrawal of United States forces if peace could not be attained; the statement also contained Avrech's acknowledgement that the statement of his proposals might lead to his court-martial.[2] On April 15, 1969, Avrech asked Corporal William R. Jackson, who was operating the mimeograph machine in the office, to make copies of the statement or allow him to operate the machine. When Jackson inquired about the contents of the stencil, Avrech replied, "[I]f I tell you that you won't let me run it off" (App. A, *infra*, p. 16). Jackson refused to mimeograph any copies. Later he noticed that Avrech had remained in the office and had printed "The Truth" as a title at the top of the stencil. When Jackson approached him, Avrech handed him the stencil and invited him to read it. After reading the statement, Jackson reproached him and subsequently turned the stencil over to a superior officer.

Upon conviction, Avrech was sentenced to reduction in rank to the lowest enlisted grade, forfeiture of three months' pay, and confinement at hard labor for one month. The commanding officer suspended the

[2] The text of the statement is printed in the opinion below (App. A, *infra*, pp. 15–16).

afinement but the remainder of the sentence was stained by the Staff Judge Advocate and the Judge dvocate General of the Navy.[1]

On December 16, 1970, Avrech sought relief in the nited States District Court for the District of Co-nbia. In addition to contending that he had been nied due process of law by reason of insufficient idence of criminal intent or commission of an at-npt, and in addition to arguing that his Vietnam tement was protected by the First Amendment, vrech asserted that the General Article on its face d as applied is unconstitutionally vague and over-oad. He sought an order requiring the Secretary of e Navy to expunge any record of his conviction as valid and to restore to Avrech all pay and benefits t because of the conviction. On August 27, 1971, mmary judgment was granted against Avrech. In anting the Secretary's motion for summary judg-nt, the district court held that Avrech's statement s not protected by the First Amendment and that e General Article is not unconstitutionally vague App. B, *infra*, pp. 27–28; App. C, *infra*, pp. 29–34).

The court of appeals, in an opinion by Mr. Justice ark filed on March 20, 1973, reversed on the ground at the General Article does not comply with the fth Amendment, holding that the relevant portions Article 134 give "no fair warning of the conduct

[1] On June 26, 1970, Avrech was given a bad conduct dis-arge from the United States Marine Corps after a second l unrelated special court-martial conviction on August 18, 9, for having stolen a camera from a Marine Corps Ex-ange, in violation of Article 121 of the UCMJ, 10 U.S.C. 921.

it proscribes and fail to provide any ascertainable standard of guilt to circumscribe the discretion of the enforcing authorities" (App. A, *infra*, p. 20). The Secretary of the Navy now appeals that decision to this Court pursuant to 28 U.S.C. 1252.

THE QUESTION IS SUBSTANTIAL

The court of appeals has held unconstitutional an act of Congress that forms an important part of the Uniform Code of Military Justice and has its roots in statutes pre-dating the adoption of the Constitution itself. If sustained, the decision below would have a profound impact on the orderly administration of justice within the military establishment. Indeed, should such a ruling be applied retroactively, the number of convictions affected thereby would run far into the thousands.

As the court below recognized (App. A, *infra*, pp. 17–18), the General Article, which it has declared unconstitutionally vague on its face,[*] is traceable to pre-Revolutionary British military law and in one form or another has been part of American military codes, enacted by Congress, since the Foundation of the Republic. In addition, this Court has expressly upheld these predecessor statutes against attacks similar to the one accepted below. *Smith* v. *Whitney*, 116 U.S. 167, 182–186; *Dynes* v. *Hoover*, 20

[*] The same result was reached by the Court of Appeals for the Third Circuit in *Levy* v. *Parker* (No. 71-1917, decided April 18, 1973), where the court held both the General Article and Article 133 (proscribing "conduct unbecoming an officer") void for vagueness. The government is appealing that decision as well to this Court pursuant to 28 U.S.C. 1252.

How. 65. The opinion below concededly also conflicts (App. A, *infra*, pp. 19–20, 23–24) with decisions of the United States Court of Military Appeals upholding the constitutionality of Article 134 against the same claim. See, *e.g.*, *United States* v. *Frantz*, 2 U.S.C.M.A. 161 (1953). Accordingly, this Court should accept jurisdiction of this appeal from the contrary holding below to resolve this important constitutional issue.

Article 134 "must be judged * * * not in vacuo, but in the context in which the years have placed it." *United States* v. *Frantz*, *supra*, 2 U.S.C.M.A. at 163. An ascertainable standard of proscribed conduct has been established by the terms of Article 134, its history, case law, and the approximately seventy specific offenses cognizable under the Article which have been explicitly included in the *Manual for Courts-Martial, United States, 1968* (Appendix 6—Forms for Charges and Specifications). While, as the opinion below points out, "[t]he Manual is not exhaustive of Article 134 misconduct" (App. A, *infra*, p. 22), the warnings are sufficiently definite "when measured by common understanding and practices." *Jordan* v. *De George*, 341 U.S. 223, 231–232. This conclusion is reinforced by the fact that the statute is addressed to the "common understanding" of a limited class, the military. Cf. *United States* v. *National Dairy Products Corp.*, 372 U.S. 29. Indeed, as part of the orientation of all military personnel, the provisions of the UCMJ—and specifically the General Article—are explained in detail. See Article 137 of the UCMJ, 10 U.S.C. 937, requiring that these provisions be "carefully explained to each enlisted member at the time of his entrance on active duty,

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or within six days thereafter" and be "explained again after he has completed six months of active duty."

We observe that Avrech, an enlistee with almost two years' service prior to the commission of his offense, was evidently aware at the time he attempted to publish the leaflet that his actions might lead to a court-martial conviction.[6] Moreover, adequacy of notice has been further insured by judicial constructions limiting the reach of the General Article to that conduct "which is directly and palpably—as distinguished from indirectly and remotely—prejudicial to good order and discipline." *United States* v. *Holiday*, 4 U.S.C.M.A. 454, 456, 16 C.M.R. 28, 30 (1954).

While there may be some degree of imprecision in the General Article, the lack of practical legislative alternatives has been noted. See Wiener, *Are the General Military Articles Unconstitutionally Vague?*, 54 A.B.A.J. 357, 363–364 (1968).[7] The court of appeals

[6] Avrech acknowledged in the statement his understanding of its possible consequences (App. A, *infra*, p. 16)—an awareness which he reacknowledged at his court-martial. The fact that Avrech may not have predicted the actual court-martial conviction does not establish lack of notice. See *Smith* v. *California*, 361 U.S. 147; *Dennis* v. *United States*, 341 U.S. 494, 515.

[7] The opinion below refers to this commentary as an example of the position of the "'old soldiers' themselves" that Article 134 is unduly indefinite when judged by the void-for-vagueness cases (App. A, *infra*, p. 21). We note that the cited commentator, Mr. Wiener, concludes that the General Article is reasonably well-settled and understood and that arguments of vagueness are counter-balanced by the pre-constitutional history of the articles as well as by the unique nature and problems of the armed forces. He also poses the question (54 A.B.A.J. at 363–364):

"[h]ow could Congress possibly legislate in minute detail

suggests that other Articles of the Code would be more suitable for controlling much of the conduct now within the scope of the General Article. This call for alternative means is not without its own problems, however. For example, it is suggested (App. A, *infra*, pp. 25–26, n. 4) that Avrech's statement could better have been punished under the sedition statute, 18 U.S.C. 2387, which applies even to non-servicemen but requires "a clear and present danger that the activities in question will bring about the substantive evils"—such as insubordination and mutiny—delineated in the statute. Had Avrech been tried under this section, he might now stand convicted of sedition rather than attempting to publish a disloyal statement. To the extent that the "clear and present danger" test of Section 2387 imposes a more rigorous standard than the "direct and palpable prejudice to good order and discipline" test of the General Article, the difference in the formulations would seem to be justified by the gravity of the respective crimes proscribed, and the imperative need to have a code of conduct applicable exclusively to soldiers on active duty with the armed forces.

While some questions could be conceived to show

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what are 'disorders and neglects to the prejudice of good order and discipline,' or specify with particularity 'all conduct of a nature to bring discredit upon the armed forces'? Inevitably, new disorders and new misconduct not falling within the legislative enumeration but clearly comprehended under the existing phraseology would occur to the ingenuity of those subject to military law."

the possible vagueness of the application of the General Article in hypothetical situations, in practical effect no one punished under the statute can reasonably argue lack of notice. As one commentator observed, "in reviewing many thousands of cases involving article 134 and its predecessors, not a single instance has been found in which it could be concluded that no one could reasonably believe that the conduct charged was not in some way prejudicial to discipline or discreditable to the service." Graynor, *Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article,* 22 Hast. L. J. 259, 288–289 (1971). Other commentators have reached the same conclusion. Wiener, *Are The General Military Articles Unconstitutionally Vague?, supra,* 54 A.B.A.J. at 364. In view of the requirement of some sort of *mens rea* in the standard specification framed under the General Article and applied to Avrech,[*] there is no reason to invalidate the statute for vagueness, especially in a case where the defendant's conduct was clearly not privileged and he knew that what he was doing was wrong. Cf. *United States* v. *Guest,* 383 U.S. 745, 754, 785–786 (noting that a scienter requirement can save a criminal statute from being held void for vagueness); *Screws* v. *United States,* 325 U.S. 91.

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[*] The model specification promulgated for this kind of conduct under the General Article, which was followed in this case, provides an allegation that the disloyal statement was published "with design to promote disloyalty and disaffection among the troops."

## CONCLUSION

Probable jurisdiction should be noted and the case set for oral argument.

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General.*

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JUNE 1973.

# APPENDIX A

## United States Court of Appeals
## for the District of Columbia Circuit

No. 71-1841

MARK AVRECH, APPELLANT

*v.*

THE SECRETARY OF THE NAVY

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

Decided March 20, 1973

*Dorian Bowman* and *David Bain* for appellant.

*Harold H. Titus, Jr.*, United States Attorney, and *John A. Terry, Michael A. Katz* and *James F. McMullin*, Assistant United State Attorneys, for appellee.

Before Mr. JUSTICE CLARK,* and WRIGHT and WILKEY, *Circuit Judges.*

Mr. Justice CLARK: Appellant, Mark Avrech, brought this suit seeking a declaration that his 1969 court-martial conviction was constitutionally invalid

* Mr. Justice Tom C. Clark, United States Supreme Court, Retired, sitting by designation pursuant to 28 U.S.C. § 294 (a) (1970).

under the First and Fifth Amendments and an order that the conviction be expunged from his military record and that he recover all pay and benefits lost by reason of the conviction.[1] Avrech was convicted of violating Article 134 of the Uniform Code of Military Justice, known as the "General Article,"[2] which imposes criminal sanctions on "all disorders and neglects to the prejudice of the good order and discipline in the armed forces" and "all conduct of a nature to bring discredit upon the armed forces."[3] More specifically, Avrech was charged with attempting to publish and publishing a statement disloyal to the United States, with design to promote disloyalty and disaffection among the troops. After pleading not

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[1] The jurisdiction of the District Court is not questioned here nor is the existence of a case or controversy. We find both jurisdiction and justiciability present.

[2] Article 134, General Article, 10 USC 934:

"Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court."

The third clause, referring to crimes and offenses not capital, is not in issue in this case. References in the opinion to Article 134 or the General Article are meant to encompass only the first two clauses.

[3] Maximum punishments under the Uniform Code are fixed in the Manual for Courts Martial by Executive Order of the President. Article 134 punishments run from 20 years imprisonment and dishonorable discharge for assault with intent to commit murder or rape to one month's imprisonment and forfeiture of two-thirds of one month's pay for, e.g., appearing in an unclean uniform. The offense charged here carries a three year maximum sentence. See Table of Maximum Punishments, *Manual for Courts-Martial*, 1969.

guilty, he was acquitted of publishing but found guilty of attempting to publish the article. He complains that the language of Article 134 is unconstitutionally vague and overbroad under the Fifth Amendment in that the Article did not give him fair notice that his contemplated statement was forbidden; he also urges that his statement was protected free speech under the First Amendment. The District Court upheld his conviction. We reverse on the Fifth Amendment ground.

1. *Background of the Prosecution:*

Avrech enlisted in the Marines in 1967 and was sent to Vietnam in February, 1969, with the rank of private first class. While stationed at Danang and on night duty with the group supply offices, Avrech typed up a stencil criticizing American involvement in Vietnam. It stated:

> "I've been in this country now for 40 days and I still don't know why I'm here. I've heard all the arguments about communist aggression and helping the poor defenseless people. I've also heard this three years ago. The entire Vietnamese Army will switch to a pacification role in 1967 and leave major fighting to the American troops. (Statement of South Vietnamese Foreign Minister, L.A. Times, Nov. 18, 1966.) It seems to me that the South Vietnam people could do a little for the defense of their country. Why should we go out and fight their battles while they sit home and complain about communist aggression. What are we cannon fodder or human beings? If South Vietnam was willing to go it on their own back in 1964 what the hell is the matter with them now? The United States has no business over here. This is a conflict between two different politically minded groups. Not a direct attack on the United States. It's not worth killing American

boys to have Vietnam have free elections. (Former Vice President Richard M. Nixon, L.A. Times, December 31, 1967.) That was our present leader of this country and now he has the chance to do something about the situation and what happens. We have peace talks with North Vietnam and the V.C. That's just fine and dandy except how many men died in Vietnam the week they argued over the shape of the table? Why does this country think that it can play games with peoples lives and use them to fight their foolish wars, I say foolish because how can you possibly win anything like a war by destroying human lives. Human lives that have no relation at all to the cause of the conflict. Do we dare express our feelings and opinons with the threat of court-martial perpetually hanging over our heads? Are your opinions worth risking a court-martial? We must strive for peace and if not peace then a complete U.S. withdrawal. We've been sitting ducks for too long.******SAM*"

Sometime thereafter Avrech asked his immediate superior, Corporal William R. Jackson, who was operating the mimeograph machine in their office, to duplicate the statement or permit him to do so. When Jackson inquired as to the content of the stencil, Avrech replied: "If I tell you that you won't let me run it off." Jackson then refused. Later Avrech let Jackson read the stencil; the latter reproached Avrech and subsequently turned it over to a superior officer. This prosecution followed.

Avrech was sentenced to confinement at hard labor for one month, reduction in rank, and forfeiture of pay for three months. The Commanding Officer suspended the confinement but the remainder of the sentence was sustained by the Staff Judge Advocate and the Judge Advocate General of the Navy. On

June 26, 1970, Avrech received a bad conduct discharge after a second and unrelated special court-martial conviction for having stolen a camera from the Navy Exchange. The Navy Court of Military Review, in ordering the discharge, took into account Avrech's conviction here under attack.

The District Court granted the Government's motion for summary judgment, holding that Avrech's statement was not protected by the First Amendment and that Article 134 provides a sufficiently definite warning as to the proscribed conduct and a sufficiently ascertainable standard of guilt to survive the constitutional vagueness challenge.

2. *History and Components of Article 134:*

We need not pause to detail the history of Article 134. Its antecedents go back to British military sources prior to American Independence. In this country the Constitution entrusted to the Congress the power "to make Rules for the Government and Regulation of the land and naval Forces," Article I, § 8, Cl. 14. In 1950, pursuant to this grant, the Congress adopted the Uniform Code of Military Justice. Article 134 of the Code includes three clauses which prohibit (1) "all disorders and neglects to the prejudice of good order and discipline in the armed forces;" (2) "all conduct of a nature to bring discredit upon the armed forces;" and, (3) crimes and offenses not capital (this last clause not being here in issue). The General Article is the American version of an older provision of military law known by the British as the "Devil's Article." A distinguished commentator and leading authority in the field, William Hough, made no attempt to define the "disorders" proscribed in the Article's antecedents, only characterizing them as acts that "more usually take place under

circumstances unconnected with duty and are esteemed disorderly or insubordinate conduct." The Practice of Courts-Martial (1825) at 634. Hough's examples of "disorders" included habitual insubordinate language and conduct at the mess, drunkenness, abusing and striking a sentry on duty, and adultery with the wife of a soldier. Id. at 642. Hough defined "neglect" to mean "neglecting to observe standing orders and regns., or, those orders which are issued and intended to be carried into immediate execution or shortly after." Id. at 633. His examples of "neglect" including keeping the books in a negligent manner, not reporting infectious diseases to the proper authority, and allowing government goods to be stolen. Id. at 641. The second clause of Article 134, prohibiting "all conduct of a nature to bring discredit upon the armed forces," was originally enacted for the "single purpose" of subjecting retired enlisted men to court-martial punishment for conduct similar to that proscribed under Article 133 for retired officers. Both clauses have been expanded beyond recognition and now encompass the residue of offenses that have sprung up with what were thought to be the necessities of disciplining the ever-increasing population of the armed forces. While the United States Court of Military Appeals has held that conduct condemned by the General Article must be "directly and palpably—as distinguished from indirectly and remotely—prejudicial to good order and discipline," *United States* v. *Holiday*, 4 USCMA 454, 456 (1954), the Article now encompasses over seventy specific offenses. The listed offenses range from "abusing a public animal" to "disloyalty to the United States" with such offenses as dishonorably failing to pay a debt, malingering, straggling, pandering, and assault with intent to

commit murder in between. This crazy quilt of offenses is patched together in the Manual for Court-Martial, issued as an Executive Order of the President under Article 836 of the Code, which authorizes the President to prescribe "procedures, including modes of proof, in cases before courts-martial." The latest manual, promulgated by an Executive Order of the President, is dated September 11, 1968, and known as Manual for Courts-Martial, United States, 1968. The military forces have "amplified" (to use a word employed in the Government's brief) the General Article by including in Appendix 6—Forms for Charges and Specifications—the seventy-odd charges described above. The Executive Order "prescribing" the Manual has saving clauses covering prior investigations, trial after arraignment or other actions begun before its effective date. A further proviso excludes "any act done or omitted prior to the effective date of this manual which was not punishable when done or omitted."

3. *The Theory of the Armed Forces:*

(1) The Government argues that the Article 134 language here under scrutiny has acquired a core of settled and understandable content through long tradition and the listing of specific offenses in the Manual. *United States* v. *Frantz*, 2 USCMA 161 (1953). In the Frantz case the Court of Military Appeals assumed that civilian vagueness standards apply to the military but concluded that the Article had achieved a meaning sufficiently settled and definite to overcome the vagueness claim. The Government also points to *Dynes* v. *Hoover*, 61 U.S. 65 (1858), holding that a military law provision comparable in scope to the General Article was not subject to abuse because the nature of the proscribed conduct and its punishment were

"well known by the practical men in the navy and army." At 82. And, Winthrop, *Military Law and Precedents* (2d Edition 1920), in speaking of military custom, includes those service-wide practices which have prevailed for a long period of time and which are "well defined, equitable and uniform in application." At 42–43.

We believe, however, that today Article 134 gives no fair warning of the conduct it proscribes and fails to provide any ascertainable standard of guilt to circumscribe the discretion of the enforcing authorities. Interpretation of the General Article through the Manual to proscribe some seventy explicit offenses, rather than evidencing settled and understandable meaning, indicates just the contrary. For example, not until 1951 did the disloyalty charge prosecuted here become a badge of infamy within reach of the Manual. And even *Frantz*, supra, did not crystallize the phantom offenses that could be included within Article 134, for we find the 1968 edition of the Manual continues to expand their number. Indeed, the only apparent purpose of Article 134 is to act as a catch-all for varied types of unforeseen misconduct not otherwise covered by the Code. Though servicemen may be instructed on the meaning and proper applications of Article 134, the Article's development demonstrates that its coverage has no limits. At most, instruction could only inform servicemen of the specific conduct deemed punishable under the Article in the past and of the fact that comparable misconduct may likewise be punished. And often this would not shed much light on the peculiar facts involved in the act under scrutiny since even conduct listed in the Manual must be found prejudicial to good order and discipline or service discrediting. *United States* v. *Gittens*, 8 USCMA 673 (1953). Nor can we approve

the practice under Article 134 of judicially creating new offenses by analogizing them to previously recognized offenses under that Article. See Everett, Article 134, Uniform Code of Military Justice—A Study in Vagueness, *37 North Carolina L. Rev.* 142, 152–153, 157–158 (1959). For example, the acceptance of money for transporting passengers in a government vehicle, conduct not mentioned in the Manual under Article 134, has been analogized to graft and bribery (three year offenses). United States v. Alexander, 3 USCMA 346 (1953). The Supreme Court recently condemned the "punishment by analogy" approach in *Papachristou* v. *City of Jacksonville,* 405 U.S. 156 168–169 (1972): "Such crimes [derived by analogy], though long common in Russia, are not compatible with our constitutional system."

Moreover, the old authorities cited bear little weight. Not only has the General Article been expanded beyond recognition, but the greater percentage of our armed forces are today non-career personnel. They are draftees or enlisted personnel with little military experience. Even the "old soldiers" themselves say that the language in Article 134 judged by the void-for-vagueness cases is "unduly indefinite." Wiener, Are the General Military Articles Unconstitutionally Vague? 54 *ABA Journal* 357, 363 (1968). Furthermore, the highest of judicial authority in the Army recommends the abolition of Article 134 because "we can't defend our use of it in this modern world. It probably could not withstand a 'vague and indefinite' attack in the Supreme Court." Kenneth J. Hodson (Chief Judge, United States Army Court of Military Review), "Perspective, The Manual for Courts-Martial, 1984," 57 *Military Law Review* 1, 12 (1972). These two officers, the former a distinguished con-

stitutional authority as well as a World War II Colonel in the Judge Advocate General's Department, and the latter, himself a renowned former Judge Advocate General as well as the present Chief Judge of the Army's highest court, speak both impressively and authoritatively. And the opinions of the Military Court of Appeals add more weight to this conclusion. It has held repeatedly that the Manual does not limit or confine Article 134. The Manual is not exhaustive of Article 134 misconduct; its crazy quilt of offenses does not cover Article 134's bed. See, e.g., *United States* v. *Sadinsky*, 14 USCMA 563 (1964). Further, the inclusion of specific conduct in the Manual specifications does not necessarily mean the conduct is punishable under the Article. *United States* v. *Alexander*, 12 USCMA 26 (1960). The Court of Military Appeals has held that it is reversible error for the court-martial law officer not to instruct that acts charged under Article 134 must be found either to have prejudiced good order and discipline or have discredited the armed forces, even though the charges against the accused track the language of a Manual specification. *United States* v. *Gittens*, supra. In *United States* v. *Smith*, 13 USMCA 105, 119 (1962), the Court held that Congress never delegated the power to make substantive rules by way of the Manual and that the Manual was intended merely to serve as a substitute for legal research facilities insofar as it includes rules of substantive law. In the same year the court refused to permit the use of an erroneous instruction on self-defense, though prescribed by the Manual; since it was a matter of substantive law rather than procedure, the Manual did not control. *United States* v. *Acosta-Vargas*, 13 USMCA 388. These cases demonstrate it is neither necessary nor sufficient that a

serviceman's conduct fit a Manual specification in order for him to incur criminal liability under Article 134. Nothing could point more accusingly to the vagueness of Article 134 than for the Court of Military Appeals to say that in the final analysis, the Manual is but a mini-digest of the roving character of Article 134, whose vague and indefinite language is absolutely controlling. Clearly the broad net of Article 134 will catch an accused though the Manual does not.

(2) Nevertheless, the Government says the clear knowledge of Avrech that his actions might lead to a court-martial shows that he had fair warning that Article 134 prohibited his proposed action. We find the law to the contrary. The fear, if any, which Avrech had that his action might lead to his court-martial does not demonstrate that he knew his actions were covered by Article 134. Nor does it provide a substitute for the Article's vague and indefinite language. *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964). There the Court found "it irrelevant that petitioners at one point testified that they had intended to be arrested," since "the record is silent as to what petitioners intended to be arrested for * * *." Whether a statute affords "fair warning . . . must be made on the basis of the statute itself and the other pertinent law, rather than on an ad hoc appraisal of the subjective expectations of particular defendants." At 355–356, n.5.

(3) The Government says further that civilian standards of specificity do not apply to the military. We have concluded that they do. Indeed, the Court of Military Appeals assumed in *Frantz*, supra, that civilian standards applied and found "the conceivable presence of uncertainty" in the first two clauses of Article 134. However, it found that the Article had

acquired the "core of a settled and understandable content of meaning" that established standards "well enough known to enable those within . . . [its] reach to correctly apply them." 2 USMCA at 163. As we have noted, we disagree with this conclusion. We prefer to accept the import of *United States* v. *Howe*, 17 USMCA 165, 178–179 (1967), where the Court accepted the application of general Supreme Court standards in civilian cases without indicating any departure from those standards in the name of military necessity. Likewise, we follow the view of the United States Air Force Board of Review in *United States* v. *McLeod*, 18 CMR 814 (1954) and the Coast Guard Board of Review in *United States* v. *Barker*, 26 CMR 838 (1958). Both applied the requirements of the Fifth Amendment to military courts-martial.

It is true that the Supreme Court originally adopted a hands-off policy towards courts-martial. As late as 1950 the Court quoted with approval *re Grimley* (United States v. Grimley), 137 U.S. 147, 150 (1890), that "the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial . . . The single inquiry, the test, is jurisdiction." *Hiatt* v. *Brown*, 339 U.S. 103 at 111. However, in the same year, in a unanimous opinion by Mr. Justice Douglas, the Court stated that if a court-martial denies a defendant the opportunity to raise a defense then it has no jurisdiction to find guilt. *Whelchal* v. *McDonald*, 340 U.S. 122, 124. Three years later in *Burns* v. *Wilson*, 346 U.S. 137 (1953), Chief Justice Vinson in an opinion joined by three other members of the Court, stated that federal courts are empowered to hear a denial of due process by the military, if the latter has refused to hear such claims or has misapplied constitutional requirements. Justices Black

and Douglas dissented because they thought the military had misapplied civilian due process standards. Finally, Mr. Justice Black in *Reid* v. *Covert*, 354 U.S. 1, 37 (1957), said the applicability of the Bill of Rights to the military was "as yet . . . not . . . clearly settled." And in *O'Callahan* v. *Parker*, 395 U.S. 258, 265–266 (1969) the Court through Mr. Justice Douglas posed the query whether Article 134 satisfies the standards of vagueness developed by civilian courts, but he did not pause to answer.

The question, however, seems settled in this Circuit by *Kauffman* v. *Secretary of the Air Force*, 415 F. 2d 991, 997 (1969), where the court said:

> "We hold that the test of fairness requires that military rulings on consitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule."

It is true that this proviso excepts from Supreme Court standards those situations where conditions peculiar to military life require a different rule. However, the trial court apparently found no such conditions present in this case since it applied Supreme Court standards. None have been shown here. Moreover as General Hodson points out, other Articles are available to cover the offenses now punished under the General Article, e.g., Articles 92 and 128, which would serve the military just as well.[4] 57 *Military Law*

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[4] The availability of effective, and we might add, preferable alternatives to punishing disloyal statements under Article 134 is evidenced by the companion cases of *United States* v. *Daniels*, 19 USCMA 529 (1970), and *United States* v. *Harvey*, 19 USCMA 539 (1970). *Harvey* indicates that disloyal statements are subject to punishment under 18 U.S.C. 2387 as well as Article 134. *Daniels* holds that conviction under Sec. 2387 requires "'a clear and present danger that the activities in ques-

(Continued)

*Rev.*, 1, 12. The Government, however, questions t
application of Supreme Court standards to milita
personnel stationed in a combat zone. We readi
understand its apprehension, but the argument
beside the point because there are Articles other tha
134 that fully and satisfactorily govern combat situ
tions. Two Articles, 92 and 99, come to mind. Th
punish failure to obey any lawful order or regulati
and misbehavior before the enemy, respectively.
General Hodson so clearly says: "We don't rea
need" Article 134. It is purely and simply a hou
keeping device and the specific conduct which it h
been held to prohibit can be as effectively controll
through the utilization of other Articles of the Co
It therefore appears to us that there is no valid mi
tary justification for suspending the application of t
constitutional right of fair warning to Article 134.
follows that the General Article must fall.

*Reversed*

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(Continued)
tion will bring about the substantive evils' delineated in
statute [insubordination, mutiny, refusal of duty, etc.]"
contrast, Article 134 merely requires a finding that the st
ment was prejudicial to good order and discipline or ser
discrediting. In view of the *Harvey* court's recognition of
vagueness problems involved—i.e., "Words by themselves
not always reveal their character . . . The Vietnam war
evolved a vast outpouring of written and oral comment.
language of many of the comments is poised on a thin
between rhetoric and disloyalty to the United States."
544)—we doubt the military would consider itself prejudi
if forced to rely on Sec. 2387, incorporating as it does a "c
and present danger" test.

## APPENDIX B

### Opinion of District Court—August 20, 1971

[SAME TITLE]

WASHINGTON, D.C.,
*Friday, August 20, 1971.*

The above-entitled matter came on for hearing before His Honor HOWARD F. CORCORAN, United States District Judge, at 10:00 o'clock a.m.

*Appearances:*

*For the Plaintiff: David Rein,* Esq., and *Dorian Bowman,* Esq.

*For the Defendant: Michael A. Katz,* Esq.

EXTRACT FROM TRANSCRIPT OF PROCEEDINGS

(Judge's Oral Opinion Only)

The COURT. Well, I am not prepared at this particular point, gentlemen, to render a learned opinion, but I have been over the papers very carefully, and I am of the opinion that the plaintiff's motion for summary judgment should be denied, and the government's motion for summary judgment should be granted.

I think the court has to take jurisdiction under the Kaufman case, and that we have to look at these proceedings to see whether or not they do meet the constitutional standards set out by the Supreme Court.

But the way I size up the case, I think this plaintiff's actions have to be viewed in the light of all of the surrounding circumstances. As I said in the course

of the argument, what might not be objectionable i
one setting could be objectionable in another setting
Recognizing that First Amendment rights are no
absolute, particularly in connection with the affairs o
the military, I think that the triers of fact cannc
be criticized for having found this man guilty a
charged when we consider all of the circumstance
under which the statements were made.

They were made in Danang, at Fire Base No.
while the unit was in combat. A perfectly proper in
ference to be drawn from those statements is tha
they were designed to undermine the morale of th
unit while the unit was under fire, and I cannot quar
rel with the triers of fact that that is the inferenc
they drew from the circumstances.

As to the vagueness, I have just finished studyin
very carefully Mr. Weiner's article in the *America*
*Bar Association Journal,* and I am quite impresse
with his reasoning that this Article 134 can withstan
the attack on vagueness.

So those are the underlying reasons why I rule as
do.

If I have time—I have only a few more days o
the bench for the time being—if I have time, I wi
prepare a short memorandum which can serve as th
basis of an appeal, if you wish to take it. I will n
guarantee to get it out, but I will do my best.

(Whereupon, at this point the court adjourned.)

## APPENDIX C

### Opinion of District Court—October 21, 1971

[SAME TITLE]

This case came before the Court on cross-motions for summary judgment. The facts are noted briefly.

I

Plaintiff is a former member of the United States Marine Corps. In 1969 while serving with the Marine Corps in the Republic of Viet Nam he was convicted by a Marine Corps special court-martial of having attempted to utter a disloyal statement with design to promote disloyalty and disaffection among the troops in violation of Articles 80 and 134 of the Uniform Code of Military Justice. (UMCJ) 10 U.S.C. §§ 880, 934.[1]

[1] Article 80 merely provides that an attempt to commit an offense is a crime and a person guilty of such a crime may be punished "as a court-martial may direct." Plaintiff was convicted under Article 80 of attempting to violate Article 134 which reads:

"Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court."

The statement which led to plaintiff's conviction was typed on a mimeograph stencil and presented for printing by the plaintiff while he was stationed at Marble Mountain Air Facility, Danang, a forward base in the war zone. In his statement, plaintiff expressed dissent from United States policy and objectives in South Viet Nam, strongly suggested that the United States should not be fighting in South Viet Nam and urged that "we must strive for peace and if not peace then a complete U.S. withdrawal."

As a result of his conviction, plaintiff was sentenced to be reduced to pay grade E–1, to forfeit $70 pay per month for three months and to be confined at hard labor for one month. The convening authority suspended that portion of the sentence adjudging confinement.

Plaintiff seeks (1) a declaration that his court-martial conviction is invalid as violative of the First and Fifth Amendments to the Constitution; (2) restoration of all pay and benefits of which he was deprived by virtue of said special court-martial conviction and (3) an order expunging said court-martial from all military records.

## II

The government argues that the Court lacks jurisdiction to review the plaintiff's conviction because he is not now in custody and because his less than honorable discharge did not stem from the conviction here at issue. But the Court considers that *Kauffman* v. *Secretary of Air Force,* 415 F.2d 991 (1969) compels a finding that the Court has jurisdiction. In *Kauffman* our Court of Appeals said that habeas corpus to secure release from confinement is not the exclusive form of collateral attack on a court-martial judgment in civilian courts. The Court held that it had

jurisdiction to review Kauffman's court-martial conviction for constitutional error where Kauffman's conviction had resulted in his discharge from the armed forces under other than honorable conditions. The rational of *Kauffman* would appear to apply equally to the instant case. While plaintiff's court-martial conviction in this case did not cause his discharge under other than honorable conditions, the Court believes that plaintiff's conviction for publishing disloyal statements in a war zone may result in a continuing disability which will affect him in civilian life in a manner similar to the "stigma experienced by a recipient of a discharge under other than honorable conditions." Everett, *Military Administrative Discharges—the Pendulum Swings*, 1966 Duke L.J. 41, 50.

The government further contends that the scope of review on collateral attack of a court-martial is limited to an inquiry as to whether the military authorities "dealt fully and fairly" with the claims raised. *Burns* v. *Wilson*, 346 U.S. 137, 142 (1953). However, our Court of Appeals in *Kauffman, supra*, determined that "*Burns* did not apply a standard of review different from that currently imposed in habeas corpus review of state convictions," *Kauffman, supra*, at 997, and held that this standard required that "military rulings on constitutional issues conform to Supreme Court standards." *Id.* Since the Court views *Kauffman* as controlling, it must examine plaintiff's court-martial conviction to determine whether it conforms with prevailing Supreme Court standards of constitutionality.

III

Plaintiff asserts that his court-martial conviction is unconstitutional because Article 134 of the Uniform Code of Military Justice under which he was con-

victed,' on its face and as applied, is vague and overbroad in violation of the Due Process Clause of the Fifth Amendment. He specifically argues that the general language of the Article, i.e., "all disorders and neglects to the prejudice of good order and discipline," does not, with sufficient accuracy, define that conduct which is prohibited.

The Court is of the opinion that Article 134 is not unconstitutionally vague. The language of Article 134 "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Jordan* v. *DeGeorge*, 341 U.S. 223, 231–32 (1951). The Court of Military Appeals, in sustaining the constitutionality of Article 134, noted that the Article—

> must be judged . . . not in vacuo, but in the context in which the years have placed it. That the clauses under scrutiny have acquired the core of a settled and understandable content of meaning is clear from the no less than forty-seven different offenses cognizable thereunder explicitly included in the Table of Maximum Punishments of the Manual [for Courts-Martial], pages 224–227. Accordingly, we conclude that the Article establishes a standard "well enough known to enable those within . . . its reach to correctly apply them." *United States* v. *Frantz*, 2 U.S.M.A. 161, 163 (1953). (citations omitted)

Considering the terms of Article 134, its history, the provisions of the various manuals for courts-martial (*see* para 213, Manual for Courts-Martial, 1951) and interpretive case law, it is clear that the Article establishes an ascertainable standard of guilt and therefore is not void for vagueness. *See generally*, Wiener, *Are the General Military Articles Unconstitutionally Vague?*, 54 A.B.A.J. 357 (1968).

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[1] *See* note 1 *supra*.

Plaintiff, further alleges that his conviction is un-
nstitutional because it was based upon statements
de by him which are protected by the First Amend-
nt. Even under the rule laid down in *Kauffman,*
*ora,* as to the nature of civilian review of courts-
rtial for constitutional sufficiency, the Court finds
plaintiff's free speech claims without merit.
While the United States Court of Military Appeals
s recognized that the First Amendment is applica-
to servicemen, *United States* v. *Voorhees,* 4
SCMA 509, 16 CMR 83 (1954), it has also realized
t the right of free speech must be balanced against
military's peculiar need to safeguard discipline
l morale. *United States* v. *Giordano,* 15 USCMA
, 166–67, 35 CMR 135 (1964). Indeed the Supreme
urt itself has recognized that "those subject to mili-
y discipline are under many duties and may not
im many freedoms that we hold inviolable as to
se in civilian life." *Board of Education* v. *Barnette,*
U.S. 624, 642, note 19 (1943). First Amendment
hts are not absolute even in the civilian sphere.
gulation as to the time, place and manner of exer-
e is proper where reasonably necessary to protect a
id public interest. *Cox* v. *Louisiana,* 379 U.S. 536,
(1965).
Our nation has a valid interest in insuring that its
litary services are able to maintain the military
cipline essential to an effective fighting force. The
otection of this interest necessarily entails placing
ater limits on the serviceman's right of free speech.
seems clear that plaintiff's conduct in attempting
publish his statement to the members of a military
it which was at that time engaged in active military
mbat operations presented a distinct threat to the
intenance of military discipline and morale within
unit. In view of the circumstances of the attempted

publication, this Court does not find that the conviction of the plaintiff violated his First Amendment rights.

Plaintiff's motion for summary judgment is denied and defendants motion for summary judgment is granted.

HOWARD F. CONCORAN, *Judge.*

Dated: OCTOBER 21, 1971.

# APPENDIX D

## United States Court of Appeals for the District of Columbia Circuit

(No. 71-1841)

MARK AVRUCH, APPELLANT

*v.*

SECRETARY OF THE NAVY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: *Mr. Justice Clark,** and *Wright* and *Wilkey*, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION THEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed in accordance with the opinion of this Court filed herein this date.

Per Curiam.

For the Court:

HUGH E. KLINE, *Clerk*.

Dated: MARCH 20, 1973.

Opinion for the Court filed by Justice Clark.

Filed Mar. 20, 1973.

*Mr. Justice Tom C. Clark, United States Supreme Court, Retired, sitting by designation pursuant to 28 U.S.C. § 294(a) (1970).

# APPENDIX E

## United States Court of Appeals for the District of Columbia Circuit

**(No. 71-1841)**
**(C.A. No. 3664-70)**

MARK AVRECH APPELLANT

*v.*

SECRETARY OF THE NAVY APPELLEE

### NOTICE OF APPEAL

Notice is hereby given that appellee, the Secretary of the Navy, appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. § 1252, from the judgment of this Court entered March 20, 1973, reversing the judgment of the District Court.

HAROLD H. TITUS, JR.
*United States Attorney.*

JOHN A. TERRY
*Assistant United States Attorney.*

JAMES F. MCMULLIN
*Assistant United States Attorney.*



U.S. GOVERNMENT PRINTING OFFICE: 1973

FILED
JAN. 30

# Supreme Court of the United States

October Term, 1972

No. 72-1713

SECRETARY OF THE NAVY,

*Appellant,*

v.

MARK AVRECH,

*Appellee.*

On Appeal from the United States Court of Appeals
for the District of Columbia Circuit

## MOTION TO AFFIRM

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## APPENDIX E

United States Court of Appeals
for the District of Columbia Circuit

(No. 71-1841)
(C.A. No. 3661-69)

MARK AVRICH APPELLANT

*v.*

SECRETARY OF THE NAVY APPELLEE

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HAROLD H. TITUS, JR.
*United States Attorney*

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*Assistant United States Attorney*

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JUL 30
MICHAEL RODAK, J

# Supreme Court of the United States

October Term, 1972

No. 72-1713

SECRETARY OF THE NAVY,

*Appellant,*

*v.*

MARK AVRECH,

*Appellee.*

On Appeal from the United States Court of Appeals
for the District of Columbia Circuit

## MOTION TO AFFIRM

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## MOTION TO AFFIRM

Appellee moves this Court, pursuant to Rule 16, to affirm the judgment of the Court of Appeals on the ground that the decision below is so manifestly correct as not to need further argument before this Court.

### Statement

The Court of Appeals, below, in a unanimous opinion written by Mr. Justice Clark and concurred in by Judges Wright and Wilkey, invalidated a court-martial conviction of the appellee on the ground that Article 134 of the Uniform Code of Military Justice, 10 U.S.C. §934, is unconstitutionally vague. After reviewing the history of Article 134 and its current usage by the military, the court below concluded that:

> "... Article 134 gives no fair warning of the conduct it proscribes and fails to provide any ascertainable standard of guilt to circumscribe the discretion of the enforc-

ing authorities . . . Indeed, the only apparent purpose of Article 134 is to act as a catchall for varied types of improper misconduct not otherwise covered by the Code." (J.S. 20)[1]

## Argument

1. Appellant argues (J.S. 6) that the constitutionality of Article 134 presents a substantial question because of an alleged conflict with the prior decisions of this Court in *Smith v. Whitney*, 116 U.S. 167, and *Dynes v. Hoover*, 20 How. 65, and because Article 134 has established "an ascertainable standard of proscribed conduct" by virtue of "its history, case law, and the approximately seventy specific offenses cognizable under the Article which have been explicitly included in the Manual for Courts-Martial" (J.S. 7). Neither of these arguments is substantial.

As Justice Clark pointed out below, "the old authorities cited bear little weight" (J.S. 21). They were decided in 1858 (*Dynes v. Hoover*), and 1886 (*Smith v. Whitney*). They did not, and obviously could not, have considered the issue of whether Article 134 was void for vagueness in the light of the modern doctrine of vagueness which was first enunciated by this Court in *Connally v. General Construction Co.*, 269 U.S. 385 (1926). It is clear that under modern standards Article 134 cannot pass constitutional muster. See *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969), *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), *Staub v. Baxley*, 355 U.S. 313 (1958), *Gelling v. Texas*, 343 U.S. 960 (1952). In addition, *Dynes v. Hoover* and *Smith v. Whitney* predated the growth of the doctrine that verdicts of courts could be collaterally attacked by habeas corpus or otherwise on constitutional grounds other than the bare question of jurisdiction. *Johnson v. Zerbst*, 304 U.S. 458 (1938). Burris and Jones, *Civilian Courts and Courts-Martial—The Civilian Attorney's Perspective*, 10 Amer. Crim. Law Review 139,

1. "J.S." refers to the Jurisdictional Statement.

142 (1971). As Justice Clark noted below (J.S. 24), those cases dated from an era when the Supreme Court "adopted a hands-off policy towards courts-martial" holding that "the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial . . . The simple inquiry, the test, is jurisdiction."

Justice Clark, in addition, fully reviewed the arguments made by appellant here based on the history of Article 134, its usage, and its implementation in the Manual. He concluded:

> "Interpretation of the General Article through the Manual to proscribe some seventy explicit offenses, rather than evidencing settled and understandable meaning, indicates just the contrary. For example, not until 1951 did the disloyalty charge prosecuted here become a badge of infamy within reach of the Manual. . . . [W]e find the 1968 edition of the Manual continues to expand their number. Indeed, the only apparent purpose of Article 134 is to act as a catchall for varied types of unforeseen misconduct not otherwise covered by the Code." (J.S. 20).
>
> * * *
>
> "And the opinions of the Military Court of Appeals add more weight to this conclusion. It has held repeatedly that the Manual does not limit or confine Article 134. The Manual is not exhaustive of Article 134 misconduct; its crazy quilt of offenses does not cover Article 134's bed . . . Further, the inclusion of specific conduct in the Manual specifications does not necessarily mean the conduct is punishable under the Article . . . These cases demonstrate it is neither necessary nor sufficient that a serviceman's conduct fit a Manual specification in order for him to incur criminal liability under Article 134. Nothing could point more accusingly to the vagueness of Article 134 than for the Court of Military Appeals to say that in the final analysis, the Manual is but a mini-digest of the roving character of Article 134,

whose vague and indefinite language is absolutely co
trolling. Clearly the broad net of Article 134 will cat
an accused although the Manual does not." (J.S. 22-23

In short, all of the considerations and arguments advanc
in appellant's jurisdictional statement were fully considere
analyzed and discussed in Justice Clark's opinion and the app
lant presents nothing new which merits consideration by th
Court. Accordingly, the judgment below should be affirmed
the basis of Justice Clark's opinion. Further, as noted in t
jurisdictional statement (p. 6, fn. 5), the only other appella
court to consider the question unanimously reached the sa
result as the court below. *Levy v. Parker*, ___ F.2d ___ (3
Cir. April 18, 1973).

2. It should further be noted that the specific char
levied against appellee under Article 134, an attempt to publi
a "disloyal" statement, was held to be unconstitutionally vag
in violation of the Fifth Amendment and unconstitutional
overbroad in violation of the First Amendment in *Stolte, et*
*v. Laird*, 353 F.Supp. 1392 (D.D.C. 1972). Significantly, t
government did not appeal this decision, thus implicitly reco
nizing its correctness. Accordingly, the judgment below wou
in any event have to be affirmed on the authority of the *Stol*
case, which, since it was not appealed by the governme
remains the law in the District of Columbia.[2]

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2. Appellee raised, in the courts below, the question of the vag
ness of the words "disloyalty" and "disaffection," used in the cou
martial charge here. However, the Court of Appeals did not reach the iss
in view of its holding with respect to Article 134. In addition, appell
argued below that his statement was protected free speech under the Fi
Amendment, an issue which was also not reached by the court below (J.
15).

## Conclusion

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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July 30, 1973

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# In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1713

SECRETARY OF THE NAVY, APPELLANT

*v.*

MARK AVRECH

*ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE APPELLANT

### OPINIONS BELOW

The opinion of the court of appeals (J.S. App. A, pp. 13–16) is reported at 477 F. 2d 1237. Neither the written nor the oral opinion of the district court (J.S. App. C, pp. 29–34, J.S. App. B, pp. 27–28) is reported.

### JURISDICTION

Appellee brought this civil action in the United States District Court for the District of Columbia under 5 U.S.C. 701–706, 28 U.S.C. 1331 and 1361, and D.C. Code (1961 ed., Supp. V) 11–521, challenging his court-martial conviction for attempting to violate Article 134 of the Uniform Code of Military Justice, 10 U.S.C. 934. The district court dismissed the

suit, but on March 20, 1973, the United States Court of Appeals for the District of Columbia Circuit entered a judgment of reversal (J.S. App. D, p. 35), holding that Article 134 is unconstitutionally vague. A notice of appeal to this Court (J. S. App. E, p. 36) was filed with the court of appeals on April 19, 1973. Probable jurisdiction was noted on October 9, 1973.

This Court has jurisdiction under 28 U.S.C. 1252, since the court of appeals, in a civil action to which an officer of the United States is a party, held an Act of Congress unconstitutional. See Stern and Gressman, *Supreme Court Practice* § 2.5 (4th ed.).

## STATUTE INVOLVED

Article 134 of the Uniform Code of Military Justice (10 U.S.C. 934) provides:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

## QUESTIONS PRESENTED

1. Whether Article 134 of the Uniform Code of Military Justice, 10 U.S.C. 934, is unconstitutional as applied.

2. Whether Article 134 is unconstitutional on its face.

## STATEMENT

1. On June 24, 1969, appellee Avrech, then a United States Marine serving on active duty in Vietnam, was tried by a special court-martial on charges of having violated Article 80 and Article 134 of the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. 880, 934. Article 80 provides for punishment of attempts to commit offenses otherwise punishable under the UCMJ; Article 134—the General Article—penalizes, *inter alia*, "all disorders and neglects to the prejudice of good order and discipline in the armed forces" and "all conduct of a nature to bring discredit upon the armed forces."[1] Although he was acquitted on the specification filed under the General Article itself, Avrech was convicted on the specification drawn under Article 80, charging an attempt to commit the offense charged under the General Article.[2] This specification alleged that Avrech had attempted to publish to members of the Armed Forces, "with design to promote disloyalty and disaffection among the troops,"[3] a statement disloyal to the United States.

The events leading to the conviction took place at Marble Mountain Air Facility, at Danang, in Vietnam, while Avrech was on active duty in the combat zone. After enlisting in the Marines in August 1967, Avrech

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[1] A third clause, referring to "crimes and offenses not capital," is not at issue in this case.

[2] The charges and specifications under Article 80 and Article 134 are reprinted in full in the Appendix, pp. 3–5.

[3] The requirement of specific intent in this charge was modeled on the standard forms contained in the *Manual for Courts-Martial, United States*, 1968 (Appendix 6-*Forms for Charges and Specifications*). The latest edition of the Manual is the Revised Edition, 1969.

arrived in Vietnam as a private first class in Februar 1969. While on night duty with the group suppl offices at his base, he typed a stencil of a statemer (Tr. 32a)[4] which was entitled "The Truth" an marked "Volume I Number I." It stated:

> I've been in this country now for 40 days an I still don't know why I'm here. I've heard a the arguments about communist aggression an helping the poor defenseless people. I've als heard this three years ago. The entire Vie namese Army will switch to a pacification rol in 1967 and leave major fighting to the Ameri can troops. (Statement of South Vietnames Foreign Minister, L.A. Times, Nov. 18, 1966. It seems to me that the South Vietnam peopl could do a little for the defense of their coun try. Why should we go out and fight their bat tles while they sit home and complain abou communist aggression. What are we cannor fodder or human beings? If South Vietnam wa willing to go it on their own back in 1964 wha the hell is the matter with them now? Th United States has no business over here. Thi is a conflict between two different politicall minded groups. Not a direct attack on th United States. It's not worth killing America boys to have Vietnam have free elections. (For mer Vice President Richard M. Nixon, L.A Times, December 31, 1967.) That was our pres ent leader of this country and now he has th chance to do something about the situation and what happens. We have peace talks with North Vietnam and the V.C. That's just fine and

[4] "Tr." refers to the Summarized Record of Trial (Proper) reprinted in the appendix to the briefs in the court of appeals

> dandy except how many men died in Vietnam the week they argued over the shape of the table? Why does this country think that it can play games with peoples lives and use them to fight their foolish wars. I say foolish because how can you possibly win anything like a war by destroying human lives. Human lives that have no relation at all to the cause of the conflict. Do we dare express our feelings and opinions with the threat of court-martial perpetually hanging over our heads? Are your opinions worth risking a court-martial? We must strive for peace and if not peace then a complete U.S. withdrawal. We've been sitting ducks for too long. * * * SAM[5]

On April 15, 1969, Avrech asked Corporal William R. Jackson, who was operating the mimeograph machine in the office, to make copies of the statement or allow him to operate the machine (Tr. 25a). When Jackson inquired about the contents of the stencil, Avrech replied, "[I]f I tell you that you won't let me run it off" (Tr. 25a). Jackson refused to mimeograph any copies. Later he noticed that Avrech had remained in the office and had printed "The Truth" as a title at the top of the stencil (Tr. 25a–28a). When Jackson approached him, Avrech handed him the stencil and invited him to read it (Tr. 28a). After reading the statement, Jackson reproached him and subsequently turned the statement over to a superior officer (Tr. 26a).

Avrech testified that he had prepared his stencil to record his thoughts and circulate a written statement

[5] See J.S. App. A, pp. 15, 16.

for discussion (Tr. 33a). According to Avrech, this tract was intended as the first of a series, to be supplemented when he formulated additional thoughts on the subject (Tr. 35a). Avrech denied that "The Truth" was disloyal to the United States (Tr. 39a). A witness for the government, however, testified that Avrech had stated earlier that it was disloyal (Tr. 52a). Avrech testified that at the time he tried to run off the stencil he believed that a court-martial was unlikely (Tr. 36a), but the statement itself contained Avrech's acknowledgement that his actions might lead to a court-martial (Tr. 36a).

Upon conviction, Avrech was sentenced to reduction in rank to the lowest enlisted grade, forfeiture of three months' pay and confinement at hard labor for one month. The commanding officer suspended the confinement, but the remainder of the sentence was sustained by the Staff Judge Advocate and the Judge Advocate General of the Navy.*

2. On December 16, 1970, Avrech sought relief in the United States District Court for the District of Columbia. Avrech alleged that the General Article on its face and as applied was unconstitutionally vague and overbroad. In addition he contended that his anti-war statement was protected by the First Amendment, and that he had been denied due process

* On June 26, 1970, Avrech was given a bad conduct discharge from the United States Marine Corps after a second and unrelated special court-martial conviction on August 18, 1969, for having stolen a camera from a Marine Corps Exchange, in violation of Article 121 of the UCMJ, 10 U.S.C. 921.

of law because he was convicted without sufficient evidence of criminal intent.

Avrech sought an order requiring the Secretary of the Navy to expunge any record of his conviction and to restore all pay and benefits lost because of the conviction. In granting the Secretary's motion for summary judgment, the district court held that Avrech's statement was not protected by the First Amendment and that the General Article was not unconstitutionally vague (J.S. App. B, pp. 27–28; J.S. App. C, pp. 29-34).

The court of appeals, in an opinion by Mr. Justice Clark, reversed on the ground that the General Article violates due process since the relevant portions of that statute give "no fair warning of the conduct it proscribes and fails to provide any ascertainable standard of guilt to circumscribe the discretion of the enforcing authorities" (J.S. App. A, p. 20). The court of appeals did not decide the First Amendment issue or whether Avrech's conduct violated Article 134.

## SUMMARY OF ARGUMENT

### I

The court below held that Article 134 was void-for-vagueness on its face. While we disagree with that holding (*infra,* III), our first submission is that the court below acted improperly in judging the statute on its face. We believe that the court should have evaluated the Article in its application to this particular case. If Avrech had "fair warning" that his conduct was proscribed by the Article, the Article should have been sustained as applied. While this

Court has on occasion invalidated statutes on their face, without regard to their application to a particular case, where they directly impinge upon First Amendment interests, we submit, for several reasons, that this approach should not be applied to the military Articles.

In the first place the military is a specialized society with a history, tradition and disciplinary needs unfamiliar to civilian society and civilian courts. To promote and enforce discipline essential to its effectiveness, the military has had a General Article, similar to Article 134, since the founding of the Republic. Long ago this Court recognized that the "apparent indeterminateness" of the Article to civilian courts did not exist in the services, where its meaning was "well known by practical men in the navy and army." *Dynes* v. *Hoover,* 20 How. 65. Moreover, the recognized necessary restrictions on freedom of speech in the armed services (See Emerson, *Toward a General Theory of the First Amendment,* 72 Yale L.J. 877, 935 (1963)) suggest that civilian courts should not strike down military laws on their face because of an alleged "chilling effect" on First Amendment rights. Finally, facial invalidation is inappropriate where a statute, like Article 134, forbids primarily nonexpressive conduct and has only marginal application to speech. *Broadrick* v. *Oklahoma,* No. 71–1639, decided June 25, 1973.

## II

Article 134 is not unduly vague as applied to Avrech's conduct. Avrech was charged with attempting to publish a statement disloyal to the United

States, "with design to promote disloyalty and disaffection among the troops." The statement at least implicitly urged members of the armed forces not to participate in the United States' military efforts in Vietnam. At the time Avrech was a marine of two years standing, on active duty in a combat zone. Any one in his position would have known that conduct such as his was patently "to the prejudice of good order and discipline in the armed forces." Moreover, the *Manual for Courts-Martial,* a definitive official publication promulgated by the President, specifically warns that conduct such as that of Avrech would violate Article 134.

## III

We finally submit that, should Article 134 be judged on its face rather than as applied, the Article is neither unduly vague nor overly broad. While the language of Article 134 is general, the military gives specificity to the Article in a number of ways. In the first place military court decisions have limited the Article to conduct that is "directly and palpably—as distinguished from indirectly and remotely—prejudicial to good order and discipline." *United States* v. *Sadinsky,* 14 U.S.C.M.A. 563, 565. Moreover, the *Manual for Courts-Martial* contains lengthy discussions and illustrations of violations of the Article (See Apps. A, B, and C, *infra*). This articulation of the meaning of the general language in Article 134 is sufficient to overcome any vagueness challenge. Cf. *United States Civil Service Commission* v. *National Association of Letter Carriers,* AFL–CIO, No. 72–634, decided June 25, 1973.

Finally, Article 134 is not overly broad. Arti
134 is not in terms directed at speech at all; it p
hibits any actions that prejudice good military or
and discipline. The principal speech-related activit
which the Article covers are those forbidden by t
"disloyal statement" specification. That specificati
(*infra*, pp. 35–36), requires that a statement be ma
with the intention of promoting disloyalty and dis
fection among the troops, that the statement itself
disloyal to the United States and that the cond
"directly and palpably" prejudice good military or
and discipline. The *Manual* further illustrates the p
hibition, listing as three examples of disloyal utt
ances: "praising the enemy, attacking the war ai
of the United States, or denouncing our form of g
ernment" (¶ 213f (5)). These elements are fu
ther specified by military court decisions limiting t
disloyal statement specification to (1) public utt
ances which (2) actively call for opposition to t
military policy of the United States. Given the nec
sary limitations on freedom of speech in the milita
to the extent that Article 134 forbids disloyal sta
ments which undermine good military order and dis
pline, it does not offend the First Amendment.

## ARGUMENT

### I. THE COURT OF APPEALS IMPROPERLY DETERMINED TH CONSTITUTIONALITY OF ARTICLE 134 ON ITS FACE; SHOULD HAVE DETERMINED WHETHER THE ARTICLE UNCONSTITUTIONAL AS APPLIED

The court of appeals held that on its face Artic
134 is unconstitutional because it is unduly vagu

It did not rule that Avrech was punished for doing something which he could not reasonably have known constituted conduct "to the prejudice of good order and discipline in the armed forces"—the standard in Article 134—or that Avrech's activity did not constitute such conduct. Instead, without considering either of those issues, the court invalidated the entire provision because it concluded that Article 134 does not generally give "fair warning of the conduct it proscribes" and provides no "ascertainable standard of guilt."

We submit that the court of appeals took the wrong approach in evaluating the constitutionality of Article 134. Instead of considering the validity of the provision as an abstract matter on the basis of hypothetical applications of the Article, it should have tested its application in this particular case. If, as we believe and argue below, Avrech was, or should have been, aware that his attempt to distribute within the combat zone his attack on American military activities in Vietnam was a kind of action that Article 134 clearly prohibits, that should have been the end of the matter. There was no occasion for the court of appeals to strike down Avrech's conviction because of its conclusion that in other situations or applications it might not give adequate notice to those charged with its violation. Similarly, if the provision is constitutional as applied to Avrech, there is no reason to invalidate it for overbreadth on the basis of problems that might arise in its possible application in other situations not before the court.

This Court on occasion has struck down on the face and without regard to their validity, as applied the particular case, statutes whose prohibitions d rectly impinge upon or significantly implicate Fir Amendment rights (see pp. 18–19, *infra*). The theo of those decisions was that the mere existence of th statute itself had a chilling effect upon the exerci of the constitutionally protected rights, and that fu protection of those rights therefore required that th statute be invalidated without regard to whether had any impermissible impact upon the individu against whom it had been applied in the particula case. That rationale, however, is not appropriate i determining the constitutionality of the Articles whic govern the conduct of members of the armed force Although the guarantees of the First Amendmen apply to the military, the different character of th military community requires a different approach i determining how the First Amendment guarantees ar to be applied in that segment of society. To develo this analysis, it is necessary first to describe the spe cial character of the military community and the rule and customs that govern the conduct of its member

A. THE MILITARY COMMUNITY IS A SPECIALIZED SOCIETY GOVERN BY SPECIALIZED RULES AND CUSTOMS WHICH ARE WELL KNOW TO AND CONTROL THE CONDUCT OF ITS MEMBERS

The military is a specialized society with a history tradition and function wholly different from civilia society. The central mission of the military is "to figh or be ready to fight wars * * *" *Toth* v. *Quarles*, 35 U.S. 11, 17. "An army is not a deliberative body. It i the executive arm. Its law is that of obedience. N

question can be left open as to the right to command in the officer, or the duty of obedience in the soldier.' *In re Grimley,* 137 U.S. 147, 153. More recently, this Court pointed out that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian" (*Orloff* v. *Willoughby,* 345 U.S. 83, 94), and that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty * * *" (*Burns* v. *Wilson,* 346 U.S. 137, 140).

In order properly to perform its special mission and to promote and enforce the discipline essential to its effectiveness, the military historically developed and enforced usages and customs which "may not unfitly be called the customary military law." *Martin* v. *Mott,* 12 Wheat. 35; Winthrop, *Military Law and Precedents* (2d ed., 1920), p. 41. Violations of these usages and customs were punishable by courts-martial. Thus, the Articles of the Earl of Essex (1642) provided that "[a]ll other faults, disorders and offences, not mentioned in these Articles, shall be punished according to the general customs and laws of war" (Winthrop, *supra,* p. 720). The British Articles of War of 1765—using the language now in the General Article—made punishable "all Disorders or Neglects * * * to the Prejudice of good Order and Military Discipline * * *" that were not mentioned in other articles.[7] In 1775 the Continental Congress adopted the British provision for the Army and reenacted it

[7] Winthrop, *Military Law and Precedents* (2d ed., 1920), p. 946.

in 1776. Except for the revision of 1916, which adde the clause punishing "all conduct of a nature to brin discredit upon the military service," substantially th same language has been preserved in the numerou Congressional reenactments of the Articles of War

The customs of the military were explicitly recog nized by Congress in the Navy's disciplinary code o 1799, which provided for punishment according t "the custom and usage of the sea service." [9] The 186 Revision of the Articles for the Government of th Navy, approved by President Lincoln, provided tha "[a]ll offences committed by persons belonging to th navy which are not specified in the foregoing article shall, be punished as a court-martial shall direct." [10] Although the Uniform Code of Military Justice adopted in 1951, used language more like that in th Army's Articles of War, it made no substantive change in the Navy's standards.[11]

Civilian courts have long recognized the special na ture of the military environment and its particular

[9] The legislative history of the General Article is described in Wiener, *Are the General Military Articles Unconstitutionally Vague?* 54 A.B.A.J. 357 (1968). The opinion below refers to this commentary as an example of the position of the "'old soldiers' themselves" that Article 134 is unduly indefinite when judged by the void-for-vagueness cases (J.S. App. A, p. 21). Mr. Wiener, however, concludes that the Article is not vague by modern standards, since its meaning is well-settled and understood within the military environment.

[9] Act of March 2, 1799, 1 Stat. 709, 717.

[10] Act of July 17, 1862, ch. 204, 12 Stat. 600, 603.

[11] S. Rep. No. 486, 81st Cong., 1st Sess.; Wiener, *supra*, 54 A.B.A.J. at 358; see, also, Gaynor, *Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article*, 22 Hastings L.J. 259, 260–261 (1971).

need for discipline and obedience, and that the seemingly imprecise standards of the general articles gain meaning from the customs of the service and provide adequate standards of conduct to those in the military. More than a century ago this Court, in *Dynes* v. *Hoover,* 20 How. 65, 79, upheld the Navy's General Article against an attack similar to that here. The Court recognized the importance of discipline and morale in the armed forces and held that a provision of "apparent indeterminateness" to a civilian court gained meaning and concreteness from the practical understanding of men trained in the customs of the service. It rejected the argument that the court-martial had no jurisdiction over a seaman's attempt to desert and ruled that the offense was covered by the 32d Naval Article, which provided that "[a]ll crimes committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs in such cases at sea." The Court reasoned (20 How. at 82):

> [W]hen offences and crimes are not given in terms or by definition, the want of it may be supplied by a comprehensive enactment, such as the 32d article of the rules for the government of the navy, which means that courts martial have jurisdiction of such crimes as are not specified, but which have been recognised to be crimes and offences by the usages in the navys of all nations, and that they shall be punished according to the laws and customs of the sea. Notwithstanding the apparent indeterminateness of such a provision, it is not liable to abuse; for what those crimes are, and how

> they are to be punished, is well known by practical men in the navy and army, and by those who have studied the law of courts martial, and the offences of which the different courts martial have cognizance.

This Court again recognized the proper role of "unwritten military law and usage" to give content to the General Article in *Swaim* v. *United States,* 165 U.S. 553. In *Swaim,* the Judge Avocate General of the Army had himself been convicted of conduct to the prejudice of good order and military discipline, but argued that no offense under that Article was shown by the facts of his case. This Court rejected the argument (165 U.S. at 561–562):

> If this position were well taken it would throw upon the civil courts the duty of considering all the evidence adduced before the courts-martial and of determining whether the accused was guilty of conduct to the prejudice of good order and military discipline in violation of the articles of war.
>
> But, as the authorities heretofore cited show, this is the very matter that falls within the province of courts-martial, and in respect to which their conclusions cannot be controlled or reviewed by the civil courts. As was said in *Smith* v. *Whitney,* 116 U.S. 178, of questions not depending upon the construction of the statutes, but upon unwritten military law or usage, within the jurisdiction of courts-martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law. * * *

This Court's opinion in *Swaim* largely followed Judge Nott's opinion for the Court of Claims in that case, 28 Ct. Cl. 173. After discussing the Article punishing conduct unbecoming an officer and a gentleman, Judge Nott observed (28 Ct. Cl. at 228) that cases involving "conduct to the prejudice of good order and military discipline are still further beyond the bounds of ordinary judicial judgment, for they are not measurable by our innate sense of right and wrong, of honor and dishonor [as is conduct unbecoming an officer], but must be gauged by an actual knowledge and experience of military life, its usages and duties." See, similarly, *Smith* v. *Whitney,* 116 U.S. 167, 178–179, 183–184; *United States* v. *Fletcher,* 148 U.S. 84, 91–92; *Carter* v. *McClaughry,* 183 U.S. 365, 386–387, 390, 400–401. Cf. *Ex parte Quirin,* 317 U.S. 1, 29–31, 35.

These provisions and decisions have recognized, since the founding of the Republic, that because of the special situation of the military—its need to maintain discipline and order, and the particular customs reflected in traditional military conduct which the civilian courts cannot fully comprehend or properly evaluate—the military is governed by different standards than civilian society; and that it is unwise and dangerous for the civilian courts to attempt to evaluate military discipline on the basis of the standards by which civilian crime is determined. As former Chief Justice Warren stated, after noting that historically the civilian courts have maintained a "hands off" attitude toward the military (Warren, *The Bill*

*of Rights and the Military,* 37 N.Y.U. L.J. 181, 187 (1962)):

> [I]t is indisputable that the tradition of our country, from the time of the Revolution until now, has supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have. Many of the problems of the military society are, in a sense, alien to the problems with which the judiciary is trained to deal.

B. THE FACT THAT CERTAIN APPLICATIONS OF ARTICLE 134 MAY INVOLVE SPEECH THAT IS PROTECTED BY THE FIRST AMENDMENT DOES NOT REQUIRE THAT THE CONSTITUTIONALITY OF THE ARTICLE BE DETERMINED ON ITS FACE

The traditional rule of constitutional adjudication is that "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick* v. *Oklahoma,* No. 71–1639, decided June 25, 1973, slip op. 9. This rule has been altered in the First Amendment context, however, to permit "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute with the requisite narrow specificity." *Dombrowski* v. *Pfister,* 380 U.S. 479, 486. See, also, *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 432–433; *Coates* v. *City of Cincinnati,* 402 U.S. 611; *Keyishian* v. *Board of Regents,* 385 U.S. 589. The reason for this

relaxed rule of standing is the possible "chilling effect" such statutes might have on the exercise of First Amendment rights. Permitting individuals to challenge the facial validity of the statute, irrespective of its application to their particular activity, is a means of lessening the prospect that persons whose activity is constitutionally protected will be deterred from exercising their rights by fear of criminal sanctions. See *Thornhill* v. *Alabama*, 310 U.S. 88, 97–98.

This principle, however, should not be applied in considering constitutional challenges to the Uniform Code of Military Justice, which governs the conduct of military personnel. Unlike civilian society, where the individual is largely left alone by the State and is required only to avoid transgressing well-defined prohibitions, members of the armed forces are required affirmatively to meet certain standards of conduct established largely by tradition and developed in the light of the particular character and requirements of the military establishment. "In military life there is a higher code termed honor, which holds its society to stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code" (*Fletcher* v. *United States*, 26 Ct. Cl. 541, 563).

Although, as the Court of Military Appeals has recently pointed out, "servicemen, like civilians, are entitled to the constitutional right of free speech" (*United States* v. *Priest*, 21 U.S.C.M.A. 564, 570), that right necessarily is more limited for servicemen than for civilians. As Professor Emerson has stated (Emerson, *Toward a General Theory of the First Amend-*

*ment*, 72 Yale L.J. 877, 935 (1963)): "To a certain extent, at least, the military sector of a society must function outside the realm of democratic principles, including the principle of freedom of expression." The Court of Military Appeals has explained the reasons for these necessary limitations on freedom of speech (*United States* v. *Priest, supra*, 21 U.S.C. M.A. at 570):

> In the armed forces some restrictions exist for reasons that have no counterpart in the civilian community. Disrespectful and contemptuous speech, even advocacy of violent change, is tolerable in the civilian community, for it does not directly affect the capacity of the Government to discharge its responsibilities unless it both is directed to inciting imminent lawless action and is likely to produce such action. *Brandenburg* v. *Ohio, supra* [395 U.S. 444]. In military life, however, other considerations must be weighed. The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected. *United States* v. *Gray, supra* [20 U.S.C.M.A. 63].

See, also, *Dash* v. *Commanding General*, 307 F. Supp. 849, affirmed *per curiam*, 429 F. 2d 427 (C.A. 4).

It follows, we believe, that as long as Article 134 put Avrech on notice that it prohibited his activity—and, as we show below, it did—there is no occasion for the civilian courts to strike it down because of its

alleged chilling effect upon the possible exercise of First Amendment rights of other servicemen in other situations. Article 134 performs a vital role in the maintenance of military discipline and order and insuring proper military conduct. It could not continue adequately to perform that office if its validity were tested not on the basis of its application to particular cases, but in relation to every hypothetical situation that could be imagined.

It is a settled principle of constitutional adjudication that "statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language" (*United States* v. *National Dairy Corp.*, 372 U.S. 29, 32). This principle is of special importance in considering statutes governing military conduct. It counsels that the civilian courts should not strike down the long-established and traditional General Article because of uncertainty of the validity of its possible application to hypothetical and conjectural situations not involved in the actual case before the court.

This Court, moreover, has been reluctant to declare a statute void on its face when there exists a substantial class of situations to which the statute may be validly applied. See, *e.g.*, *United States* v. *Petrillo*, 332 U.S. 1, 17; *United States* v. *Wurzbach*, 280 U.S. 396, 399. Even if a statute may be defective in its marginal applications, facial invalidation is inappropriate if the "remainder of the statute * * * covers a whole range of easily identifiable and constitution-

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ally proscribable * * * conduct." *United States Civil Service Commission* v. *National Association of Letter Carriers, supra,* slip op. at 31. In *Broadrick* v. *Oklahoma, supra,* the Court summarized some related principles (slip op. at 13–14):

> [T]he plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" towards conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. Cf. *Alderman* v. *United States,* 394 U.S. 165, 174–175 (1969). To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. * * *

As we show below, whatever problems there may be in applying Article 134 to peripheral situations, there is "a whole range of easily identifiable and constitution-

ally proscribable * * * conduct" (*Letter Carriers, supra*) that it covers.

Moreover, facial invalidation has been principally applied to statutes which seek to regulate "only spoken words." *Gooding* v. *Wilson,* 405 U.S. 518, 520. See *Cohen* v. *California,* 403 U.S. 15; *Street* v. *New York,* 394 U.S. 576; *Brandenburg* v. *Ohio,* 395 U.S. 444; *Chaplinsky* v. *New Hampshire,* 315 U.S. 568. Article 134 is not so limited, but broadly covers a wide variety of conduct, of which only a small part involves speech. The *Manual for Courts-Martial,* discussed in detail below, pp. 28–30, describes and specifies the elements of more than 70 different offenses which Article 134 covers; only five of those involve speech or writing.[12]

As we now show, Article 134 is not unconstitutionally vague as applied to respondent Avrech's conduct.

## II. ARTICLE 134 IS NOT UNCONSTITUTIONAL AS APPLIED TO THE CONDUCT INVOLVED IN THIS CASE

The test for determining whether a statute is impermissibly vague is whether it "conveys sufficiently

[12] In addition to the offense charged in this case—the publication with the intent to promote disloyalty and disaffection among the troops, of a statement disloyal to the United States—the four other offenses are: (1) criminal libel, defined as circulating a written defamatory statement concerning another serviceman "willfully, maliciously, and without justifiable cause" (App. 6c); (2) indecent, insulting or obscene language communicated to a female over sixteen years of age or to a child under sixteen; (3) the wrongful and knowing depositing of obscene, lewd and lascivious matter in the mails; and (4) the wrongful and unjustified communication of a threat, defined as the expression of "an avowed present determination or intent to injure the person, property, or reputation of another * * *" (¶ 213f).

definite warning as to the proscribed conduct when measured by common understanding and practices." *Jordan* v. *DeGeorge,* 341 U.S. 223, 231–232. The question is whether well-defined standards have been "developed and accepted in actual practice" to give sufficient notice to those subject to the statutory prohibition that the conduct involved is prohibited. *Small Company* v. *American Sugar Refining Company,* 267 U.S. 233, 241; see *Hygrade Provision Co.* v. *Sherman,* 266 U.S. 497, 502; *Boyce Motor Lines* v. *United States,* 342 U.S. 337, 340–341; *United States* v. *Petrillo,* 332 U.S. 1, 8. "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed" (*United States* v. *National Dairy Corp., supra,* 372 U.S. at 32–33).

The "common understanding and practices" (*Jordan, supra*) by which Article 134 is to be judged are, of course, those of the military. When the Article is examined "* * * not in vacuo, but in the context in which the years have placed it" (*United States* v. *Frantz,* 2 U.S.C.M.A. 161, 163), the conclusion is inescapable that it gave Avrech adequate notice that it prohibited the conduct in which he engaged.

Avrech was charged with attempting to publish to members of the armed forces "with design to promote disloyalty and disaffection amcng the troops" a statement disloyal to the United States. The statement at least implicitly urged members of the armed forces, to whom Avrech intended to distribute it, not to participate in military activities in Vietnam. It asked "Why should we go out and fight their battles while

they sit home and complain about communist aggression," stated that "It's not worth killing American boys to have Vietnam have free elections," and toward the end raised these questions: "Do we dare express our feelings and opinions with the threat of court-martial perpetually hanging over our heads? Are your opinions worth risking a court-martial?"

When the corporal whom Avrech requested to reproduce the stencil on the office mimeograph machine or allow him to do so asked Avrech about its contents, Avrech replied, "If I tell you that you won't let me run it off" (Tr. 25a).

At the time Avrech was a marine who had enlisted, who had been in the Service for almost two years, and who was in a combat area where he had been for four months. Someone in his position could hardly claim that he was not aware that his attempted distribution to members of the armed forces of a statement so sharply critical of American military operations in Vietnam, with its implied suggestion that his fellow soldiers should not participate therein, was conduct "to the prejudice of good order and discipline in the armed forces." Indeed, Avrech's statement itself reflects his own awareness that its publication posed the threat of court-martial, since it questioned whether other members of the armed forces were willing to run that risk in order to express their "opinions."

Avrech's knowledge that his action created the possibility of court-martial—which necessarily showed that he knew that Article 134 condemned that conduct—was hardly surprising. For, unlike civilians who are presumed to know the law, members of the armed

forces are specifically instructed concerning the Uniform Code of Military Justice and have its provisions explained to them. Article 137 of the Code requires that its provisions be "carefully explained to each enlisted member at the time of his entrance on active duty, or within sixty days thereafter" and be "explained again after he has completed six months of active duty * * *." Article 137 explicitly requires that each of the so-called punitive Articles—those defining particular offenses that are subject to punishment by court-martial, which includes Article 134—be explained to all enlisted personnel. During the almost two years that Avrech was in the marines, Article 134 thus was explained to him at least twice. Indeed, since the making of disloyal statements to the troops with the intention of promoting disloyalty and disaffection among them obviously is a serious breach of military responsibility, which is specifically dealt with in the specifications defining the proper method of charging various offenses under the Uniform Code (see, *infra*, pp. 35–38), it is not unlikely that at some point during Avrech's military service, the specific applicability of Article 134 to such conduct was discussed.

The *Manual for Courts-Martial*, a definitive official publication promulgated by the President, which describes in detail the substantive meaning of the various provisions of the Uniform Code of Military Justice (see *infra*, pp. 28–30), also makes clear the applicability of Section 134 to Avrech's conduct. The section in the *Manual* outlining types of conduct violative of Article 134 includes a discussion of "disloyal statement undermining discipline and loyalty" (¶ 213f

(5)). As examples of such misconduct, the *Manual* mentions "utterances designed to promote disloyalty or disaffection among the troops, as praising the enemy" or "attacking the war aims of the United States * * *." The same conduct is listed as violative of Article 134 in the Table of Maximum Punishments (¶ 127c) and in the forms for Charges and Specifications (App. 6c). If Avrech had any uncertainty whether his conduct would violate Article 134, reference to the *Manual* would have quickly dispelled it.

### III. ARTICLE 134 IS NOT UNCONSTITUTIONAL ON ITS FACE

If, contrary to our submission, the Court should conclude that the constitutionality of Article 134 should be determined on its face rather than as applied, then we submit that the statute is neither unduly vague nor overly broad.

#### A. ARTICLE 134 IS NOT UNDULY VAGUE

As explained above (pp. 13–17), the generalized language of Article 134 gains meaning from and embodies the well-settled customs and practices of the military community. To members of that community, it sufficiently specifies what conduct it prohibits to satisfy the constitutional requirement that criminal statutes not be unduly vague.

The military courts themselves have recognized that Article 134 cannot be applied so broadly as to turn it into a "catchall" making "every irregular, mischievous, or improper act a court-martial offense." *United States* v. *Sadinsky*, 14 U.S.C.M.A. 563, 565. Rather, its reach has been limited to conduct that is "directly and

palpably—as distinguished from indirectly and remotely—prejudicial to good order and discipline." *United States* v. *Sadinsky, supra,* at 565; *United States* v. *Holiday,* 4 U.S.C.M.A. 454, 456. The *Manual for Courts-Martial, United States,* 1969 (Revised ed.), contains a similar admonition (¶ 213b):

> Almost any irregular or improper act on the part of a member of the military service could be regarded as prejudicial in some indirect or remote sense; however, the article does not contemplate these distant effects. It is confined to cases in which the prejudice is reasonably direct and palpable.[12]

Moreover, there are many decisions by federal military and civilian courts determining whether particular conduct falls within Article 134, and that body of case law provides further definition to the statute's necessarily general language. See, Gaynor, *Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article,* 22 Hastings L.J. 259 (1971).

Another important method by which the General Article gains specificity is the analysis and treatment of it in the *Manual for Courts-Martial.* The *Manual*—which is promulgated by the President by Executive Order—is a volume of several hundred pages which discusses in detail all aspects of the court-martial system. It covers such topics as the jurisdiction of courts-martial, the preparation of charges, the general procedural rules governing courts-martial, pleas and

[12] See, also, the 1951 *Manual,* ¶ 213a; *Manual for Courts-Martial, U.S. Army,* ¶ 183a (1949); *Manual for Courts-Martial, U.S. Army,* ¶ 152a (1928).

motions, the conduct of the trial, the rules of evidence to be there applied, and appellate review. The *Manual* contains a detailed discussion, covering 77 pages, of the substantive content and essential elements of the various so-called punitive articles of the Uniform Code, *i.e.*, those articles which proscribe particular offenses.

The discussion of Article 134 covers 10 pages (¶ 213) and it explains 14 categories of offenses which are commonly tried under that Article, including the offense of which Avrech was convicted, "disloyal statement undermining discipline and loyalty" (¶ 213f(5)). A more detailed list of offenses commonly charged under Article 134 is set forth in Appendix 6c of the *Manual*, which specifies the elements of each offense by giving model "specifications" to be used in court-martial charges. This appendix contains 63 different specifications for various offenses that may be charged under Article 134. They include, in addition to the disloyal statements specification involved in this case, such varying offenses as assaults, bribery, making and uttering worthless checks, drinking liquor with a prisoner, false swearing, firearms offenses, gambling with subordinates, offenses relating to the mails, obstructing justice, committing or suborning perjury, offenses by or against a sentinel, appearing in improper uniform, and wearing unauthorized insignia. The *Manual* also contains a table of maximum punishments (¶ 127c) which lists and prescribes the punishment for a large number of different offenses under Article 134. The pertinent portions of the *Manual*

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covering these matters are set forth in Appendices A, B and C, attached hereto.

Whatever may be the status of the *Manual* as substantive military law,[14] the essential point is that the *Manual* informs members of the armed forces of the types of conduct that Article 134 prohibits. To those in the military community, who are familiar with its customs, practices and traditions, the detailed discussion and specification of the large number of offenses that may be charged under Article 134 gives further precise meaning and content to the generalized con-

[14] The status of the *Manual's* specifications as substantive military law is unsettled. Article 56, UCMJ (10 U.S.C. 856), authorizes the President to prescribe maximum limits of punishment; and Article 36(a), UCMJ (10 U.S.C. 836(a)), empowers him to prescribe "procedure[s], including modes of proof * * * by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts * * *."

The United States Court of Military Appeals has held that Congress did not and could not empower the President to define substantive offenses. *United States* v. *McCormick*, 12 U.S.C.M.A. 26; *United States* v. *Smith*, 13 U.S.C.M.A. 105, 119; cf. *United States* v. *Acostas-Vargas*, 13 U.S.C.M.A. 388. However, in *Reid* v. *Covert*, 354 U.S. 1, 38, this Court observed that "it has not yet been definitely established to what extent the President, as Commander-in-Chief of the armed forces, or his delegates, can promulgate, supplement or change substantive military law * * *."

It may be that the President, as the constitutional Commander-in-Chief of the armed forces, has inherent power to promulgate military law. In *Swaim* v. *United States*, 165 U.S. 553, for example, this Court held that the President, as Commander-in-Chief, had inherent power to convene a general court martial to try an officer. See, Wiener, *Are the General Military Articles Unconstitutionally Vague?*, 54 A.B.A.J. 357, 361 (1968).

cept of "disorders and neglects to the prejudice of good order and discipline in the armed forces." Members of the armed forces can fully appreciate, in a way that civilians cannot, the significance of such breaches of proper military conduct, all of which are detailed in the specifications under Article 134, as drinking liquor with a prisoner in a soldier's charge, discharging a firearm willfully or through carelessness, gambling with subordinates, impersonating an officer, failing properly to perform the duties of a sentinel, or not maintaining a clean weapon. Similarly, they could have no doubt about the seriousness and the illegality of making disloyal statements to members of the armed forces, with the intention of promoting disloyalty and disaffection among them, particularly in a combat zone.

In recently upholding, against similar claims of vagueness and over-breadth, the constitutionality of the prohibition in the Hatch Act against federal employees taking "an active part in political management or in political campaigns," this Court attached critical importance to the detailed content which the Civil Service Commission had given to that general prohibition by its rulings over the years whether particular activity did or did not violate the prohibition. *United States Civil Service Commission* v. *National Association of Letter Carriers, AFL–CIO, supra.* The *Manual* similarly fills in the details and provides the necessary specificity to give members of the armed forces adequate notice of what Article 134 prohibits them from doing. Since the significant consideration with respect to both the Civil Service Commission's interpretations

of the Hatch Act that this Court relied on in the *Letter Carriers* case and the *Manual* in the present case is that both give persons covered by the statute adequate notice of what it prohibits, it is immaterial that in the Hatch Act the statute specifically referred to the Commission's interpretations, whereas Article 134 is silent with respect to the *Manual*.

The court of appeals did not deny the significance of the *Manual* as a means of giving notice to members of the armed forces of the content of Article 134 and thereby providing greater specificity. It concluded, however, that because the categories of offenses specifically listed as subject to Article 134 have been expanded in recent years and may be further extended, the *Manual* could not properly be regarded as giving adequate specific content to Article 134 (J.S. App. A, p. 20). But the changes that have occurred in the coverage of Article 134, and future changes that may occur, themselves reflect changes in military custom and practice which either are or should be well known to members of the armed forces as they occur and develop. The *Manual* is not intended wholly to explicate that custom and practice. It is an illustrative handbook—available to those subject to the statute and those administering it—which specifies and defines misconduct commonly met with under Article 134, and thereby provides additional notice of the principal applications of the Article. That the number of listed offenses has increased over the years does not show dramatically shifting views within the military as to what is prejudicial to discipline

or service-discrediting, but rather demonstrates a concern to make the specific illustrations more comprehensive.

The court of appeals also stated (J.S. App. A, p. 20) that even where the *Manual* indicates that particular conduct is plainly covered by Article 134, that may not provide sufficient notice because "even conduct listed in the *Manual* must be found prejudicial to good order and discipline or service discrediting." This requirement, however, does not undermine the role of the *Manual* of giving members of the armed forces adequate notice of the conduct that Article 134 prohibits. Rather, this further particularizes and specifies the proscribed activities by making it clear that only those activities that cause prejudice to good order and discipline are illegal. This requirement thus specifically relates the conduct that Article 134 prohibits to the well-established customs and practices of the armed forces.

In effect, therefore, this requirement insures that no member of the armed forces will be convicted under Article 134 unless he reasonably knew that the conduct violated the traditional standards of the military community. Although Article 134 does not in terms require *mens rea*, convictions are practically always for knowing violations of law. See Gaynor, *supra*, *Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article*, 22 Hastings L.J. 259, 288–289. Cf. Wiener, *supra*, *Are The General Military Articles Unconstitutionally Vague?*, 54 A.B.A.J. at 364. Many of the standard forms of specification under Article 134 require some form of

*mens rea and*—as discussed later (*infra*, pp. 35–38)—the specifications in Avrech's case explicitly charged intent and required a finding of intent to convict. Cf., *e.g.*, *United States* v. *Guest*, 383 U.S. 745, 753–754, 765–786 (holding that a *scienter* requirement can save a criminal statute from unconstitutional vagueness); *Screws* v. *United States*, 325 U.S. 91.

In summary, the military's implementation of Article 134 operates to give "fair warning" of the conduct proscribed by the Article. But there is a point beyond which the requirements of Article 134 cannot be specified, lest "the standard of the Army shall come down to the requirements of a criminal code." *Fletcher* v. *United States*, *supra*, 26 Ct. Cl. at 563. As Mr. Wiener stated (*Are the General Military Articles Unconstitutionally Vague?*, 54 A.B.A.J. 357, 363–364):

> [H]ow could Congress possibly legislate in minute detail what are "disorders and neglects to the prejudice of good order and discipline," or specify with particularity "all conduct of a nature to bring discredit upon the armed forces"? Inevitably, new disorders and new misconduct not falling within the legislative enumeration but clearly comprehended under the existing phraseology would occur to the ingenuity of those who are subject to military law.

B. ARTICLE 134 IS NOT OVERLY BROAD

Article 134 is not in terms directed against speech at all; it prohibits all actions that prejudice good military order and discipline. As shown by the discussion in the *Manual* of the various offenses under that Article,

as well as the specifications and table of maximum punishments therefor (see *supra*, pp. 28–30), in most of its applications Article 134 does not deal with speech-related activities but with conduct that implicates no First Amendment interests. There are only a few instances in which the conduct to the prejudice of good military order and discipline described and specified in the *Manual* relates to speech.

As we have noted (see *supra*, pp. 18–19), it is only with respect to statutes that have a chilling effect upon the exercise of First Amendment rights that this Court has invalidated legislation on its face for overbreadth without regard to its impact in the particular case. The alleged overbreadth of Article 134 therefore must be determined not with respect to the probable applications of the Article to the broad gamut of conduct which it covers, but only to the narrower areas in which it operates to penalize speech-related activities. More specifically, the central issue with respect to the alleged overbreadth of Article 134 involves its application to disloyal statements. Does the Article sweep more broadly than is necessary in dealing with that form of activity obviously prejudicial to good military order and discipline?

The answer, we submit, is that the Article does not transgress the grounds of proper breadth in dealing with that subject. The application of the Article to the conduct involved here is particularized by the "disloyal statement" specification, which reads as follows (App. B, *infra*, p. 13a):

> In that ---------- did, (at) (on board) ----------, on or about ---------- 19 --, with design to [promote (dis-

loyalty) (disaffection) (disloyalty and disaffection) among (the troops) (the civilian populace) (the troops and the civilian populace)] [(interfere with) (impair) the (loyalty,) (morale) (and) (discipline) of members of the Armed Forces of the United States], utter to ---------- the following statement, to wit: "----------", or words to that effect, which statement was disloyal to the United States.

The making of disloyal statements, with the intention of promoting disloyalty and disaffection among the troops or interfering with and impairing their loyalty, morale and discipline, is a serious breach of military discipline. It is one which, unless promptly punished, creates a real danger of impairing the effectiveness and readiness of the armed forces to perform their military mission. Its seriousness is reflected in the fact that the table of maximum punishments permits confinement at hard labor of up to three years as a punishment therefor.

The specification is as narrowly drawn as the nature of the conduct prohibited permits. As is true with respect to the general category of offenses to the prejudice of good military order and discipline which Article 134 prohibits, it is impossible to describe in greater detail the precise kinds of statements that would be disloyal or that would have the prohibited effect upon the troops. In dealing with a subject as subtle and sensitive as the making of disloyal statements, no more can be done than promulgate the kind of general standards that the specification prescribes.

The application of these standards to a particular

statement necessarily must depend upon all the surrounding circumstances in which it was made: the precise words used, the innuendos they conveyed, the audience to which they were directed, their likely impact upon that audience, the military setting in which the statement was made, and its likely effect upon the troops.

The *Manual's* discussion of "disloyal statements undermining discipline and loyalty" illustrates the basic scope of that prohibition by listing three representative examples of "utterances designed to promote disloyalty or disaffection among troops" (¶ 213f (5)): "praising the enemy, attacking the war aims of the United States, or denouncing our form of government." With respect to anti-war statements the Court of Military Appeals has made clear that the specification applies only to active calls for opposition to the military policy of the United States. *United States* v. *Priest,* 21 U.S.C.M.A. 564; *United States* v. *Gray,* 20 U.S.C.M.A. 63; *United States* v. *Harvey,* 19 U.S.C.M.A. 539. As the specification has been construed, it is not aimed at all "[d]isagreement with, or objection to, a policy of the Government," *United States* v. *Harvey, supra,* 19 U.S.C.M.A. at 544, but only at material sufficiently prejudicial to pass the "thin line between rhetoric and disloyalty to the United States."

Moreover, the standard instructions given by military judges make clear that the "utter[ing]" required by the specification entails more than private conversation: "A statement is made 'in public' if it is made

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openly, generally, or notoriously." Military Judge'
Guide, Department of the Army Pamphlet No. 27-9
¶ 4-139 (1 June 1971). The added requirement in th
*Manual* (¶ 213b) that there must be "direct and pal
pable" prejudice to military effectiveness furthe
assures that the prohibition will not be applied mor
broadly than is necessary.

Since no one may be convicted of violating Articl
134 for this offense unless the statement was disloya
to the United States and was made with the intentio
of impairing the discipline and effectiveness of th
troops, Article 134 is not overbroad insofar as it pro
hibits such statements.

## CONCLUSION

For the foregoing reasons the judgment of the cour
of appeals should be reversed.

Respectfully submitted.

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## APPENDIX A

## MANUAL FOR COURTS-MARTIAL, 1969

### 213. ARTICLE 134—GENERAL ARTICLE

a. GENERAL

*Discussion.* Article 134 makes punishable all acts not specifically proscribed in any other article of the code when they amount to disorders or neglects to the prejudice of good order and discipline in the armed forces or to conduct of a nature to bring discredit upon the armed forces, or constitute noncapital crimes or offenses denounced by enactment of Congress or under authority of Congress. If conduct of this nature is specifically made punishable by another article, it should be charged as a violation of that article; and if it is not specifically made punishable by another article, it should be charged as a violation of Article 134. But see 212. The specification alleging a violation of Article 134 need not expressly allege that the conduct was a disorder or neglect, or that it was of a nature to bring discredit upon the armed forces, or that it constituted a crime or offense not capital. Under a specification alleging a violation of Article 134, a finding of guilty may properly be returned if the court-martial is convinced beyond a reasonable doubt that the acts of the accused constituted a disorder or neglect to the prejudice of good order and discipline in the armed forces, that his conduct was of a nature to bring discredit upon the armed forces, or that his conduct violated an applicable statute enacted by or under authority of Congress. The same conduct may constitute a disorder or neglect to the prejudice of good order and discipline in the armed forces and at the same time be of a nature to bring discredit upon the armed forces. Although evidence presented at the trial of an offense alleged under Article 134 may be insufficient to establish the commission of a crime or offense not capital, it may nevertheless be sufficient to establish a disorder or neglect to the prejudice of good order and discipline or service-discrediting conduct and thus support a conviction. See 213*d*.

*b.* DISORDERS AND NEGLECTS TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE IN THE ARMED FORCES

***Discussion.*** The disorders and neglects punishable under this clause of Article 134 include those acts or omissions to the prejudice of good order and discipline not specifically mentioned in other articles.

"To the prejudice of good order and discipline" refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense. Almost any irregular or improper act on the part of a member of the military service could be regarded as prejudicial in some indirect or remote sense; however, the article does not contemplate these distant effects. It is confined to cases in which the prejudice is reasonably direct and palpable.

Instances of prejudicial disorders and neglects in the case of an officer are rendering himself unfit for duty by excessive use of intoxicants or drugs; drunkenness; and allowing a member of his command to go on duty knowing him to be drunk.

Instances of prejudicial disorders and neglects in the case of enlisted persons are appearing in improper uniform; wrongfully abusive use of military vehicles; careless discharge of firearms; and impersonating an officer.

A *breach of a custom of the service* may result in a violation of this clause of Article 134. In its legal sense the word "custom" imports something more than a method of procedure or a mode of conduct or behavior which is merely of frequent or usual occurrence. Custom arises out of long established practices which by common consent have attained the force of law in the military or other community affected by them. There can be no such thing as a custom that is contrary to existing law or regulation. A custom which has not been adopted by existing statute or regulation ceases to exist when its observance has been long abandoned. Many customs of the service are now set forth in regulations of the various armed forces. Violations of these customs should be charged under Article 92 as violations of the regulations in which they appear.

It is a violation of this article wrongfully to possess or use marihuana or a habit forming narcotic drug. Possession or use of marihuana or a habit forming narcotic drug may be inferred to be wrongful unless the contrary appears. A person's possession or use of a drug is innocent when the drug has been duly prescribed for him by a physician and the prescription has not been obtained by fraud, when he possesses it in the performance of his duty, or when his possession or use of marihuana or a narcotic drug is without knowledge of the presence or the nature of the substance (see 154*a*(4)). If an issue is raised by the evidence as to whether possession or use by an accused charged with this offense was innocent on one of these grounds, a showing that it was not innocent on that ground becomes a requirement of proof.

*c.* CONDUCT OF A NATURE TO BRING DISCREDIT UPON THE ARMED FORCES

***Discussion.*** "Discredit" as here used means "to injure the reputation of." This clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem. Any discreditable conduct not denounced by a specific article of the code is punishable under this clause. Acts in violation of local civil law may be punished if they are of a nature to bring discredit upon the armed forces. Included within the conduct which may be found to be within the proscription of this

clause are adultery, bigamy, negligent homicide, fleeing the scene of an accident, indecent acts, and dishonorable failure to pay debts.

*d.* GENERAL REQUIREMENTS OF PROOF UNDER ARTICLE 134

The proof required for conviction of an offense under Article 134 depends upon the nature of the misconduct charged. If the conduct is punished as a crime or offense not capital (213*e*), the proof must establish every element of the crime or offense as required by the applicable law. One element of proof common to every case tried under Article 134, except one tried as a crime or offense not capital, is that the conduct of the accused, under the circumstances, was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. This element is common to all the offenses discussed in 213*f* and should be included in instructions as to the elements of these offenses, in addition to their specific elements. Subject to the foregoing, an offense under either of the first two clauses of Article 134 requires the following proof:

(1) That the accused did or failed to do the acts, as alleged; and

(2) That under the circumstances his conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

*e.* CRIMES AND OFFENSES NOT CAPITAL

Crimes and offenses not capital which are referred to and made punishable by Article 134 include those acts or omissions, not made punishable by another article, which are denounced as noncapital crimes or offenses by enactments of Congress or under authority of Congress and made triable in the Federal civil courts.

State and foreign laws are not included within the crimes and offenses not capital referred to in Article 134 and violations thereof may not be prosecuted as such except insofar as State law becomes Federal law of local application under section 13 of title 18 of the United States Code. On the other hand, an act which is a violation of a State law or a foreign law may constitute a disorder or neglect to the prejudice of good order and discipline or conduct of a nature to bring discredit upon the armed forces and so be punishable under the first or second clause of Article 134.

For the purpose of court-martial jurisdiction, the laws which may be applied under the clause, "crimes and offenses not capital," are divided into two groups:

(1) *Crimes and offenses of unlimited application.* Certain noncapital crimes and offenses denounced by the United States Code, such as counterfeiting (18 U.S.C. § 471), various frauds against the Government not denounced by Article 132, and other offenses which are directly injurious to the Government and are made punishable wherever committed are made applicable under the third clause of Article 134 to all persons subject to the code regardless of where the wrongful act or omission occurred. The Narcotic Drugs Import and Export Act (21 U.S.C. §§ 171–185) falls within this group, being applicable to the importation of proscribed drugs not only into areas over which the United States is sovereign but also into territories subject to the control of the United States for a special purpose, including military installations on foreign soil.

(2) *Crimes and offenses of local application.* Those noncapital cri and offenses which are listed in the United States Code but which are ited in their applicability to the special maritime and territorial juris tion of the United States as defined in the United States Code, t applicable within the continental United States, and those include the law of the District of Columbia, in the law of a Commonwe Territory or possession of the United States, and in the laws applicabl reservations or places over which the United States has exclusive ju diction or concurrent jurisdiction with a State, which are not specific included in another article of the code, are made applicable under Ar 134 to all persons subject to the code who commit these crimes or offe within the geographical boundaries of the areas in which they are plicable. For the law applicable in a reservation or a place over which United States has exclusive jurisdiction or concurrent jurisdiction wi State, see 18 U.S.C. § 13. A person subject to the code cannot be prosec under the third clause of Article 134 for having committed a crim offense, not capital, if the act occurred in a place where the law in ques did not apply. For example, a person cannot be prosecuted under the t clause of Article 134 for having committed a crime or offense, not cap when the act occurred in occupied foreign territory merely because act would have been an offense against the law of the District of Colu if it had been committed there. Such an act might, however, regardles where committed, in a proper case be prosecuted under the first or sec clause of Article 134 as a disorder or neglect to the prejudice of good o and discipline or as an offense of a nature to bring discredit upon armed forces.

*f.* VARIOUS TYPES OF OFFENSES UNDER ARTICLE 134

(1) ASSAULTS INVOLVING INTENT TO COMMIT CERTAIN OFFENSES OF A C NATURE

***Discussion.*** See 207 (Assault). The assaults here designated as be punishable under Article 134 are those perpetrated with intent to com murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary housebreaking. An assault with intent to commit an offense is not necessa the equivalent of an attempt to commit the intended offense, for an ass can be committed with intent to commit an offense without achieving that deg of proximity to consummation of an intended offense which is essential to attempt. See 159.

Some of these assaults will be discussed below.

(a) *Assault with intent to murder.* This is an assault committed w a specific intent to kill, under such circumstances that, if death resulted th from, the offense of murder would have been committed. To constitute an sault with intent to murder with a firearm, it is not necessary that the wea be discharged; and in no case is the actual infliction of injury necessary. T if a man with intent to murder another deliberately assaults him by shoot at him, the fact that he misses does not alter the character of the offense. W the intent to murder exists, the fact that for some unknown reason the act consummation of the murder by the means employed is impossible is no defense if the means are apparently adapted to the end in view. Thus, i

person intending to murder another loads his rifle with what he believes to be a live cartridge and aims and discharges his rifle at the other, it is no defense that, by accident, he used a dummy cartridge.

The intent to murder need not be directed against the person assaulted if the assault is committed with intent to murder some person. If the accused, intending to murder A, shoots at B, mistaking him for A, he is guilty of assaulting B with intent to murder him. Also, if a man fires into a group with intent to murder someone, he is guilty of an assault with intent to murder each member of the group.

(*b*) *Assault with intent to commit voluntary manslaughter.* This is an assault committed with a specific intent to kill under such circumstances that, if death resulted therefrom, the offense of voluntary manslaughter would have been committed. There can be no assault with intent to commit involuntary manslaughter, for involuntary manslaughter is not a crime capable of being intentionally committed.

(*c*) *Assault with intent to commit rape.* This is an assault committed by a man with a specific intent to have sexual intercourse with a woman not his wife by force and without her consent. The accused must have intended to overcome any resistance by force, actual or constructive, and to penetrate the woman's person. Any lesser intent will not suffice. Indecent advances and importunities, however earnest, not accompanied by such an intent, do not constitute this offense, nor do mere preparations to rape not amounting to an assault. Thus, if a man, intending to rape a woman, conceals himself in her room to await a favorable opportunity to execute his design, but before the opportunity arises is discovered and flees, he is not guilty of an assault with intent to commit rape.

No actual touching is necessary. If a man enters a woman's room and gets in the bed where she is for the purpose of raping her, he commits the offense under discussion although he does not touch the woman.

Once an assault with intent to commit rape is made, it is no defense that the man voluntarily desisted.

Lesser offenses that may be included in a charge of assault with intent to rape are indecent assault and assault.

(*d*) *Assault with intent to rob.* This is an assault committed with a specific intent to steal property by taking it from the person or in the presence of another, against his will, by means of force or violence or putting him in fear. The fact that the accused intended to take only money and that the person he intended to rob had none is not a defense.

(*e*) *Assault with intent to commit sodomy.* The assault must be against a human being and must be committed with a specific intent to commit sodomy. Any lesser intent, or different intent, will not suffice.

*Proof.* (*a*) That the accused assaulted a certain person, as alleged; (*b*) that the accused at the time of the assault had a specific intent to kill, as required for murder or voluntary manslaughter, or to commit rape, robbery, sodomy, arson, burglary, or housebreaking, as alleged; and (*c*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(2) INDECENT ASSAULT

***Discussion.*** See 207 (Assault). An indecent assault is the taking by a man of indecent, lewd, or lascivious liberties with the person of a female not his wife without her consent and against her will, with intent to gratify his lust or sexual desires. In a proper case indecent assault may be an included offense of assault with intent to commit rape.

***Proof.*** (*a*) That the accused assaulted a certain female not his wife by taking indecent, lewd, or lascivious liberties with her person; (*b*) that the acts were done with intent to gratify the lust or sexual desires of the accused; and (*c*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(3) INDECENT ACTS WITH A CHILD UNDER THE AGE OF 16 YEARS

***Discussion.*** This offense consists of taking any immoral, improper or indecent liberties with, or the commission of any lewd or lascivious act upon or with the body of any child of either sex under the age of 16 years with the specific intent of arousing, appealing to, or gratifying the lust or passions or sexual desires, either of the person committing the act, or of the child, or of both. When the accused is charged with taking indecent liberties, the liberties must be taken in the physical presence of the child, but it is not essential that the evidence show physical contact between the accused and the child. Thus, one who with the requisite intent exposes his private parts to a child under the age of sixteen years may be found guilty of this offense. Nonconsent by the child to the act or conduct is not essential to this offense, nor is consent a defense.

***Proof.*** (*a*) That the accused took certain immoral, improper or indecent liberties with a certain child, as alleged; or that he performed a certain lewd or lascivious act upon or with the body of a certain child, as alleged; (*b*) that the child was under the age of 16 years, as alleged; (*c*) that the intent of the accused was to arouse, appeal to, or gratify the lust or passions or sexual desires of the accused or the child or both, as alleged; and (*d*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(4) FALSE SWEARING

***Discussion.*** False swearing is the making under lawful oath, not in a judicial proceeding or course of justice, of any false statement, oral or written, not believing the statement to be true. It may consist, for example, in making a false oath to an affidavit. The oath may be taken before any person authorized by law to administer oaths. See Article 136 and chapter XXII as to the authority of certain persons to administer oaths, and see 147*a* as to taking judicial notice of the signatures of persons authorized to administer oaths. An oath includes an affirmation when the latter is authorized in lieu of an oath.

The principles set forth in the last two paragraphs of the discussion of perjury in 210 apply also to false swearing.

***Proof.*** (*a*) That the accused took an oath or its equivalent, as alleged; (*b*) that the oath was administered to the accused in a matter in which an oath was required or authorized by law; (*c*) that the oath was administered by a

person having authority to do so; (*d*) that upon this oath the accused made or subscribed a certain statement, as alleged; (*e*) that the statement was false; (*f*) that the accused did not believe the statement to be true; and (*g*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(5) DISLOYAL STATEMENT UNDERMINING DISCIPLINE AND LOYALTY

***Discussion.*** Certain disloyal statements by military personnel may lack the necessary elements to constitute an offense under 18 U.S.C. §§ 2385, 2387, and 2388, but nevertheless, under the circumstances, be punishable as conduct to the prejudice of good order and discipline or conduct reflecting discredit upon the armed forces. Examples are utterances designed to promote disloyalty or disaffection among troops, as praising the enemy, attacking the war aims of the United States, or denouncing our form of government.

***Proof.*** (*a*) That the accused made the disloyal statement, as alleged; (*b*) that the accused at the time of making the statement did so with the design alleged; and (*c*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(6) MISPRISION OF A FELONY

***Discussion.*** A person who has knowledge of the actual commission of a felony by another and who conceals and does not as soon as possible make known the same to the civil or military authorities is guilty of misprision of the felony. Any offense of a civil nature punishable under the authority of the code by death or by confinement for a term exceeding one year is a felony. A mere failure or refusal to disclose the felony without some positive act of concealment does not make one guilty of this offense. Making a false entry in an account book for the purpose of concealing a felonious theft committed by another, and intimidating a witness of a felony, are examples of a positive act of concealment.

***Proof.*** (*a*) That the accused had knowledge of the actual commission of a felony by another; (*b*) that he concealed and did not as soon as possible make known the felony to the civil or military authorities; and (*c*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(7) DISHONORABLE FAILURE TO PAY DEBTS

***Discussion.*** A dishonorable failure to pay a just debt under circumstances which bring or tend to bring discredit upon the armed forces or which are prejudicial to good order and discipline in the armed forces is an offense under this article. More than mere negligence in the nonpayment is necessary. The failure to pay must be characterized by deceit, evasion, false promises, or other distinctly culpable circumstances indicating a deliberate nonpayment or grossly indifferent attitude toward one's just obligations.

For a debt to form the basis for this offense, the accused must not have had a defense, or an equivalent offset or counterclaim, either in fact or according to his belief, at the time alleged. The offense should not be charged if there

was a genuine dispute between the parties as to the facts or law relating to the debt which would affect the obligation of the accused to pay. The offense is not committed if the creditor or creditors involved are satisfied with the conduct of the debtor with respect to payment.

The length of the period of nonpayment and any denial of his indebtedness which the accused may have made may tend to prove that his conduct was dishonorable, but the court-martial may convict only if it finds from all of the evidence that his conduct was in fact dishonorable.

A commissioned officer may be tried for this offense under either Article 133 or Article 134, as the circumstances may warrant.

***Proof.*** (*a*) That the accused was indebted to a certain person or entity in a certain sum, as alleged; (*b*) that the debt became due and payable on or about a certain date, as alleged; (*c*) that at the time alleged while the debt was still due and payable, the accused dishonorably failed to pay the debt; and (*d*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(5) DISHONORABLE FAILURE TO MAINTAIN FUNDS FOR PAYMENT OF CHECKS

***Discussion.*** One who, having made and uttered a check, thereafter dishonorably fails to maintain sufficient funds in or credit with the drawee bank for its payment upon presentment, is chargeable under this article. This offense differs from the offense denounced by Article 123a in that there need be no intent to defraud or deceive at the time of making, drawing, uttering or delivery, and that the accused need not know at that time that he did not or would not have sufficient funds for payment. The gist of the offense lies in the conduct of the accused after uttering the instrument.

Mere negligence in maintaining one's bank balance is insufficient as a basis for this offense, and the accused's conduct must reflect bad faith or gross indifference in this regard. As in 213*f*(7), dishonorable conduct of the accused is necessary, and the other principles discussed in 213*f*(7) likewise apply.

***Proof.*** (*a*) That the accused made and uttered a certain check, as alleged; (*b*) that thereafter the accused dishonorably failed to maintain funds in or credit with the drawee bank for payment of the check upon its presentment for payment in due course; and (*c*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(6) BIGAMY

***Discussion.*** Bigamy is the contracting of another marriage by one who already has a lawful spouse living. If a prior marriage was void, it will have created no status of "lawful spouse." However, if it was merely voidable and has not been voided by competent court action, this circumstance is no defense. A belief that a prior marriage has been terminated by divorce, death of the other spouse, or otherwise, constitutes a defense only if the belief was reasonable (154*a*(4)).

***Proof.*** (*a*) That, at the time and place alleged, the accused married a certain person, as alleged; (*b*) that, at the time of this marriage there existed a prior valid marriage entered into by the accused with another person, to

alleged, which prior marriage was then undissolved; and (*c*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(10) COMMUNICATING A THREAT

***Discussion.*** This offense consists of wrongfully communicating an avowed present determination or intent to injure the person, property, or reputation of another presently or in the future. The communication may be made to the person threatened or to another. To establish the threat it is necessary to show that the declaration in question was made. It is not necessary, however, that the accused actually entertained the intention stated in the declaration. However, a declaration made under circumstances which reveal it to be in jest or for an innocent or legitimate purpose, or which contradict the expressed intent to commit the act, does not constitute this offense. Nor is the offense committed by the mere statement of intent to commit an unlawful act not involving injury to another.

***Proof.*** (*a*) That the accused communicated certain language expressing a present determination or intent wrongfully to injure another person, as alleged, presently or in the future; (*b*) that the communication was made known to that person or to a third person, as alleged; (*c*) that the communication was wrongful and without justification or excuse; and (*d*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(11) FALSE AND UNAUTHORIZED PASSES, PERMITS, DISCHARGE CERTIFICATES, AND IDENTIFICATION CARDS

***Discussion.*** Certain acts with respect to military or official passes, permits, discharge certificates, or identification cards may be punishable under this article. The wrongful use, possession, sale, or other disposition of a false or unauthorized pass, permit, discharge certificate, or identification card with knowledge that it was false or unauthorized may be charged under this article. Although it is not necessary that the use, possession, sale, or disposition of the document be with an intent to deceive or defraud, the use or possession of a false or unauthorized document with such an intent is an aggravating circumstance authorizing more severe punishment. See 127*c*. See also 202A for a definition of intent to deceive and intent to defraud. The false making or altering of a military or official pass, permit, discharge certificate, or identification card may also be charged under this article. As to this offense, there is no requirement of knowledge or of an intent to deceive or defraud. The phrase "military or official pass, permit, discharge certificate, or identification card" includes, as well as the more usual forms of these documents, all documents issued by any governmental agency for the purpose of identification and copies and facsimiles thereof.

***Proof. Wrongful use or possession of a false or unauthorized pass, permit, discharge certificate, or identification card.*** (*a*) That the accused wrongfully used or had in his possession a certain military or official pass, permit, discharge certificate, or identification card, as alleged; (*b*) that the pass, permit, discharge certificate, or identification card was false or unauthorized as

alleged; (*c*) that the accused knew that the pass, permit, discharge certificate, or identification card was false or unauthorized, as alleged; (*d*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces; and, if alleged, (*e*) that the use or possession was with intent to deceive or defraud.

***Wrongful sale or disposition of a pass, permit, discharge certificate or identification card.*** (*a*) That the accused wrongfully sold or disposed of a certain military or official pass, permit, discharge certificate, or identification card, as alleged; (*b*) that the pass, permit, discharge certificate, or identification card was false or unauthorized, as alleged; (*c*) that the accused knew that the pass, permit, discharge certificate, or identification card was false or unauthorized, as alleged; and (*d*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

***Falsely making or altering a pass, permit, discharge certificate, or identification card.*** (*a*) That the accused wrongfully and falsely made or altered a certain military or official pass, permit, discharge certificate, or identification card, as alleged; and (*b*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(12) NEGLIGENT HOMICIDE

***Discussion.*** Negligent homicide is any unlawful homicide which is the result of simple negligence. Simple negligence is a lesser degree of carelessness than culpable negligence. See 198*b*. It is the absence of due care, that is, an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care for the safety of others which a reasonably prudent man would have exercised under the same or similar circumstances.

***Proof.*** (*a*) That the person named or described is dead; (*b*) that his death was unlawfully caused by the acts or omissions of the accused, as alleged; (*c*) that the acts or omissions of the accused constituted negligence; and (*d*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(13) OFFENSES AGAINST CORRECTIONAL CUSTODY

***Discussion.*** Escape from correctional[1] custody is the act of a person undergoing the punishment of correctional custody pursuant to Article 15 (131*c*(4)) who, before being set at liberty by proper authority, casts off any physical restraint imposed by his custodian or by the place or conditions of custody. Breach of restraint during correctional custody is the act of a person undergoing the punishment who, in the absence of physical restraint imposed by a custodian or by the place or conditions of custody, breaches any form of restraint imposed during this period. See 57*b* as to the manner of determining the legality of the imposition of correctional custody.

***Proof. Escape from correctional custody.*** (*a*) That the accused was duly placed in correctional custody; (*b*) that, at the time and place alleged, the accused freed himself from the physical restraint of his correctional custody, as alleged, before having been released therefrom by proper authority; and

(*c*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

*Breach of correctional custody.* (*a*) That the accused was duly placed in correctional custody; (*b*) that while in such correctional custody, a certain restraint was imposed upon the accused; (*c*) that, at the time and place alleged, the accused broke this restraint, before having been released from the correctional custody or relieved of the restraint by proper authority; and (*d*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(14) RECEIVING STOLEN PROPERTY

*Discussion.* "Receiving stolen property" is the receiving, buying, or concealing of any article or thing of value, the property of another person, with knowledge that the article or thing has been stolen.

While an actual thief is not criminally liable for receiving the property he has stolen, one who may be criminally responsible as a principal to the larceny, when not the actual thief (156), can be convicted of knowingly receiving the stolen property under Article 134. Thus, if A procures B to steal several items, agreeing to pay him a certain price for them, and B subsequently steals them and delivers them to A, A can be found guilty of knowingly receiving stolen property despite the fact that his conduct would make him guilty of larceny as a principal.

*Proof.* (*a*) That the accused received, bought, or concealed certain property of a value alleged; (*b*) that the property belonged to another person named or described; (*c*) that the property had been stolen; (*d*) that the accused then knew that the property had been stolen; and (*e*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

## APPENDIX B

### ARTICLE 134

Abusing public animal

126. In that _____ did, (at) (on board) _____, on or about _____ 19___, wrongfully (kick a public horse in the belly) (_____).

Adultery

127. In that _____ (, a married man,) did, (at) (on board) _____, on or about _____ 19___, wrongfully have sexual intercourse with _____, (a married woman) (a woman) not his wife.

Assault: —Indecent

128. In that _____ did, (at) (on board) _____, on or about _____ 19___, commit an indecent assault upon _____ by _____, with intent to gratify his (lust) (sexual desires).

—With intent to commit certain offenses

129. In that _____ did, (at) (on board) _____, on or about _____ 19___, with intent to commit (murder) (voluntary manslaughter) (rape) (robbery) (sodomy) (arson) (burglary) (housebreaking), commit an assault upon _____ by _____.

Bigamy

130. In that _____ did, at _____, on or about _____ 19___, wrongfully and bigamously marry _____, having at the time of his said marriage to _____ a lawful wife then living, to wit: _____

Bribery and graft: —Asking, accepting, or receiving

131. In that _____, being at the time (a contracting officer for _____) (the personnel officer of _____) (_____), did, (at) (on board) _____, on or about _____ 19___, wrongfully and unlawfully (ask) (accept) (receive) from _____ (a contracting company engaged in _____) (_____), (the sum of $_____) (_____, of a value of (about) $_____) (_____), [with intent to have his (decision) (action) influenced with respect to] [(as compensation for) (in recognition of) services (rendered) (to be rendered) (rendered and to be rendered) by him the said _____ in relation to] an official matter in which the United States was and is interested, to wit: (the purchasing of military supplies from _____) (the transfer of _____ to duty with _____) (_____).

—Promising, offering, or giving

122. In that _____ did, (at) (on board) _____, on or about _____ 19__, wrongfully and unlawfully (promise) (offer) (give) to _____, (his commanding officer) (the claims officer of _____) (_____), (the sum of $_____) (_____, of a value of (about) $_____) (_____), [with intent to influence the (decision) (action) of the said _____ with respect to] [(as compensation for) (in recognition of) services (rendered) (to be rendered) (rendered and to be rendered) by the said _____ in relation to] an official matter in which the United States was and is interested, to wit: (the granting of leave to _____) (the processing of a claim against the United States in favor of _____) (_____).

Burning with intent to defraud

123. In that _____ did, (at) (on board) _____, on or about _____ 19__, willfully and maliciously (burn) (set fire to) (a dwelling) (a barn) (an automobile), the property of _____, with intent to defraud (the insurer thereof, to wit: _____) (_____).

Check, worthless, making and uttering (by dishonorably failing to maintain sufficient funds)

124. In that _____ did, (at) (on board) _____, on or about _____ 19__, make and utter to _____ a certain check, in words and figures as follows, to wit: _____, (for the purchase of _____) (in payment of a debt) (for the purpose of _____), and did thereafter dishonorably fail to (place) (maintain) sufficient funds in the _____ Bank for payment of such check in full upon its presentment for payment.

Correctional custody; —escape from

125. In that _____, while duly undergoing the punishment of correctional custody, did, (at) (on board) _____, on or about _____ 19__, escape from correctional custody.

—breach of restraint during

126. In that _____, while duly undergoing the punishment of correctional custody, did, (at) (on board) _____, on or about _____ 19__, breach the restraint imposed thereunder by _____.

Criminal libel

127. In that _____ did, (at) (on board) _____, on or about _____ 19__, willfully, maliciously, and without justifiable cause (communicate to _____) (publish) (circulate among _____) a defamatory statement in writing concerning _____, a member of the U.S. (Army) (_____), (substantially) as follows: _____.

Debt, dishonorably failing to pay

128. In that _____, being indebted to _____ in the sum of $_____ for _____, which amount became due and payable (on) (about) (on or about) _____ 19__, did, (at) (on board) _____, from _____ 19__ to _____ 19__, dishonorably fail to pay said debt.

Disloyal statements

129. In that _____ did, (at) (on board) _____, on or about _____ 19__, with design to [promote (disloyalty) (disaffection) (disloyalty and disaffection) among (the troops) (the civilian populace) (the troops and the civilian populace)] [(interfere with) (impair) the (loyalty,) (morale) (and) (discipline) of members of the Armed Forces of the United States], utter to _____ the following statement, to wit: "_____", or words to that effect, which statement was disloyal to the United States.

Disorderly, drunkenness —in command, quarters, etc., under service discrediting circumstances

130. In that _____ was, (at) (on board) _____, on or about _____ 19__, (drunk) (disorderly) (drunk and disorderly) [in (command) (quarters) (station) (camp) (_____)] [on board ship] [in uniform in a public place, to wit: _____] [_____].

—Drinking liquor with prisoner

131. In that _____, a (sentinel) (_____) in charge of prisoners, did, (at) (on board) _____, on or about _____

19___, unlawfully drink intoxicating liquor with _____, a prisoner under his charge.

—Drunk, prisoner found

142. In that _____, a prisoner, was, (at) (on board) _____, on or about _____ 19___, found drunk.

—Incapacitating unanif for performance of duties through prior indulgence in intoxicating liquors

143. In that _____ was, (at)' (on board) _____, on or about _____ 19___, as a result of previous indulgence in intoxicating liquor, incapacitated for the proper performance of his duties.

Drugs, habit forming, or marihuana: —Wrongful possession —Wrongful use, transfer, or sale

144. In that _____ did, (at) (on board) _____, on or about _____ 19___, wrongfully have in his possession _____ ounces, more or less, of (a habit forming narcotic drug, to wit: _____) (marihuana).

145. In that _____ did, (at)' (on board) _____, on or about _____ 19___, wrongfully (use) (transfer) (sell) (a habit forming narcotic drug, to wit: _____) (marihuana).

—Wrongful introduction into military unit, etc.

146. In that _____ did, (at) (on board) _____, on or about _____ 19___, wrongfully introduce _____ ounces, more or less, of (a habit forming narcotic drug, to wit: _____) (marihuana) into a military (unit) (base) (station) (post) (ship) (aircraft) (_____), to wit: _____, for the purpose of (use) (transfer)' (sale) (_____).

False or unauthorized pass offenses

147. In that _____ did, (at) (on board) _____, on or about _____ 19___, wrongfully [and falsely (make) (forge) (alter by _____) (counterfeit) (tamper with by _____)] [sell to _____] [give to _____] [dispose of by _____] [(use) (have in his possession)] *[with intent to (defraud) (deceive)] (a certain instrument purporting to be) (a)' (an) (another's) (naval) (military) (official) (pass) (permit) (discharge certificate) (identification card) (_____) in words and figures as follows: _____, [he, the said _____, then well knowing the same to be (false)' (unauthorized) (_____)].

*In alleging possession or use, the allegation of intent to defraud or to deceive identifies the more serious offense; if this allegation is omitted, an offense of lesser gravity is charged. See Section A, 137c, and 212f(11).

False pretenses, obtaining services under

148. In that _____ did, (at) (on board) _____, on or about _____ 19___, with intent to defraud, falsely pretend to _____ that _____, then knowing that the pretenses were false, and by means thereof did wrongfully and unlawfully obtain from _____ services of a value of (about) $_____, to wit: _____.

False swearing

149. In that _____ did, (at) (on board) _____, on or about _____ 19___, (in an affidavit)' (in _____), wrongfully and unlawfully (make) (subscribe) under lawful (oath) (affirmation) a false statement in substance as follows: _____, which statement he did not then believe to be true.

Firearm, discharging: —Through carelessness

150. In that _____ did, (at) (on board) _____, on or about _____ 19___, through carelessness, discharge a (service rifle) (_____) in the (squadroom) (tent) (barracks) (_____ compartment) (_____)' of _____.

—Willfully, under such circumstances as to endanger life

151. In that _____ did, (at) (on board) _____, on or about _____ 19___, wrongfully and willfully discharge a firearm, to wit: _____, (in the mess hall of _____) (_____), under circumstances such as to endanger human life.

Fleeing scene of accident

152. In that _____, being (the driver of) (a passenger in) (the senior officer in) (_____ in) a vehicle at the time of (an accident) (a collision) in which said vehicle was involved, did, at _____, on or about _____ 19___, (wrongfully and willfu-

leave) *(by _____, aid and abet the driver of the said ...le in wrongfully and unlawfully leaving) the scene of the (accident) ...sion) without [rendering assistance to _____, who had been ...k (and injured) by the said vehicle] [making (his) *(the driver's) ...ity known].

*These allegations are appropriate when the accused was not the driver of the ...le.

Gambling with subordinate

158. In that (Sergeant) (_____) _____ (, boat-...n's mate first class, U.S. Navy,) (_____,) did, (at) (on ...d) _____, on or about _____ 19__, gamble with ...vate) (_____) _____ (, seaman apprentice, U.S. ...r) (_____).

Homicide, negligent

154. In that _____ did, (at) (on board) _____, on or ...t _____ 19__, unlawfully kill _____, [by negli-...ly _____ the said _____ (in) (on) the _____ ...a _____] [by driving a (motor vehicle) (_____) ...et the said _____ in a negligent manner] [_____].

Impersonating a commissioned, warrant, noncommissioned, or petty officer, or an agent or official

155. In that _____ did, (at) (on board) _____, on ...bout _____ 19__, wrongfully, willfully, and unlawfully im-...nate a [(commissioned officer) (warrant officer) (noncommissioned ...r) (petty officer) (agent of superior authority) of the (Army) ...ry) (Marine Corps) (Air Force) (Coast Guard)] [an official of the ...rnment of _____] by [publicly wearing the uniform and ...nia of rank of a (lieutenant of the _____) (_____)] ...wing the credentials of _____] [_____] (with intent ...defraud _____ by _____).

Indecent acts with a child

156. In that _____ did, (at) (on board) _____, on ...bout _____ 19__, [take (immoral) (improper) (indecent) ...ties with] [commit a (lewd) (lascivious) act (upon) (with) the body ...of _____, a (female) (male) under sixteen years of age, by ...ding (her) (him) and placing his hands upon (her) (his) leg and ...ate parts] [_____], with intent to (arouse) (appeal to) ...tify) the (lust) (passions) (sexual desires) of the said _____ ...(_____).

Indecent exposure

157. In that _____ did, (at) (on board) _____, on ...ost _____ 19__, while (at a barracks window) (_____) ...ally and wrongfully expose in an indecent manner to public view ...

Indecent, insulting, or obscene language communicated to a female or a child under the age of 16 years

158. In that _____ did, (at) (on board) _____, on ...bout _____ 19__, (orally) (in writing) communicate ...to _____, a (female) (child under the age of 16 years), certain ...ment) (insulting) (obscene) language, to wit: _____

Indecent, lewd acts with another

159. In that _____ did, (at) (on board) _____, on ...ost _____ 19__, wrongfully commit an indecent, lewd, and ...lous act with _____ by _____

Mail, taking, opening, secreting, destroying, or stealing

160. In that _____ did, (at) (on board) _____, on ...ost _____ 19__, wrongfully and unlawfully take certain mail ..., to wit: (a) [letter(s)] [postal card(s)] [package(s)], addressed ...to _____, [out of the (_____ Post Office _____) ...ivery room of _____) (unit mail box of _____) ...(_____)] [from _____] before (it) (they) (was) ...(were) (delivered) (actually received) (to) (by) the person(s) to ...whom (it) (they) (was) (were) directed, with design to [obstruct the ...correspondence] [pry into the (business) (secrets)] of _____

161. In that _____ did, (at) (on board) _____, on or ...about _____ 19__, [wrongfully and unlawfully (open) (secret) ...(keep)] [steal] certain mail matter, to wit: (a) [letter(s)] [postal

card(s)] [package(s)] addressed to _____, which said [letter(s)] [_____] [(was) (were) then [in the (_____ Post Office _____) (orderly room of _____) (unit mail box of _____) (custody of _____) (_____)] [on the (bunk of _____) (_____)]] [had previously been committed to _____, (a representative of _____,) an official agency for the transmission of communications,] before said [letter(s)] [_____] (was) (were) (delivered) (actually received) (to) (by) the person(s) to whom (it) (they) (was) (were) directed.

**Mails, depositing, etc., obscene matter in**

162. In that _____ did, (at) (on board) _____, on or about _____ 19__, wrongfully and knowingly (deposit) (cause to be deposited) in the (United States) (_____) mails, for mailing and delivery to _____, a (letter) (picture) (_____) (containing) (portraying) (suggesting) (_____) certain obscene, lewd, and lascivious matter, to wit: _____.

**Misprision of felony**

163. In that _____, having knowledge that _____ had actually committed a felony (at) (on board) _____, on or about _____ 19__, to wit: (the murder of _____) (_____), did, from about _____ 19__, to about _____ 19__, wrongfully and unlawfully conceal such felony and fail to make the same known to the civil or military authorities.

**Nuisance, committing**

164. In that _____ did, (at) (on board) _____, on or about _____ 19__, wrongfully (urinate) (defecate) (_____) [on the floor of the squadroom] [on the (deck) (bulkhead) of _____] [_____].

**Obstructing justice**

165. In that _____ did, (at) (on board) _____, on or about _____, 19__, wrongfully and unlawfully endeavor to [impede (a trial by court-martial) (an investigation) (_____)] [influence the actions of _____, (a member of the court-martial) (the military judge of the court-martial) (a trial counsel of the court-martial) (a defense counsel of the court-martial) (an officer responsible for making a recommendation concerning disposition of charges) (an officer responsible for taking action with respect to the findings and sentence of the court-martial) (_____)] [(influence) (alter) the testimony of _____ as a witness before (a court-martial) (an investigating officer) (_____)] in the case of _____, by [(promising) (offering) (giving) to the said _____, (the sum of $_____) (_____, of a value of (about) $_____)] [communicating to the said _____ a threat to _____] [_____], (if) (unless) he, the said _____, would [(vote to acquit the said _____) (_____) (recommend dismissal of the charge against the said _____) (disapprove the findings and sentence in the case of _____ and order the charges dismissed)] [(wrongfully refuse to testify) (testify falsely concerning _____) (_____)] [(at such trial) (before such investigating officer)] [_____].

**Pandering**

166. In that _____ did, (at) (on board) _____, on or about _____ 19__, wrongfully and unlawfully [(compel) (induce) (entice) (procure)] [attempt to (compel) (induce) (entice) (procure)] _____ to engage in (acts of prostitution) (sexual intercourse for hire and reward) with persons to be directed to (him) (her) by the said _____.

167. In that _____ did, (at) (on board) _____, on or about _____ 19__, wrongfully and unlawfully [receive valuable consideration, to wit: _____, on account of arranging for] [arrange for] (_____) (unnamed persons) to engage in (sexual intercourse) (sodomy) with _____, (a prostitute) (_____).

168. In that _____, a prisoner on parole, did, (at) (on board) _____, on or about _____ 19__, violate the conditions of his parole by _____. Parole, violation of

169. In that _____, having taken a lawful oath [in a proceeding before (a board of officers) (a court of inquiry) concerning _____] [upon the making of an affidavit as to _____] [_____], a case in which a law of the United States authorized an oath to be administered, that [he, the said _____, would (testify) (declare) (depose) (certify) truly] [a written (declaration) (deposition) (certificate) subscribed by him was true], did, (at) (on board) _____, on or about _____ 19__, willfully and contrary to such oath (state) (subscribe) a material matter, to wit: _____, which matter he did not then believe to be true. Perjury, statutory

170. In that _____ did, (at) (on board) _____, on or about _____ 19__, procure _____ to commit perjury by inducing him, the said _____, to take a lawful (oath) (affirmation) in a (trial by _____ court-martial of _____) (trial by a court of competent jurisdiction, to wit: _____ of _____) (deposition for use in a trial by _____ of _____) (_____) that he, the said _____, would (testify) (depose) (_____) truly, and to (testify) (depose) (_____) willfully, corruptly, and contrary to such (oath) (affirmation) in substance that _____, which (testimony) (deposition) (_____) was upon a material matter and which the said _____ did not then believe to be true. Perjury, subornation of

171. In that _____, (a sentinel) (overseer) (_____) in charge of prisoners, did, (at) (on board) _____, on or about _____ 19__, wrongfully allow _____, a prisoner under his charge, to [(go to) (enter) (go to and enter) an unauthorized place, to wit: _____] [(hold unauthorized conversation with _____) (loiter) (neglect his task by _____) (obtain intoxicating liquor) (_____)]. Prisoner, allowing to do unauthorized act

172. In that _____ did, (at) (on board) _____, on or about _____ 19__, willfully and unlawfully [(alter) (conceal) (remove) (mutilate) (obliterate) (destroy)] [appropriate with intent to (alter) (conceal) (remove) (mutilate) (obliterate) (destroy) (steal)] a public record, to wit: [the (descriptive list) (rough deck log) (quartermaster's note book) of _____] [_____]. Public record, altering, concealing, removing, mutilating, obliterating, or destroying

173. In that _____, having been duly placed in medical quarantine (in the isolation ward, _____ Hospital) (_____), did (at) (on board) _____, on or about _____ 19__, break said medical quarantine. Quarantine, medical, breaking

174. In that _____, being in the presence of (a) (an) [(general) (special) court-martial] [duly appointed board of officers] [officer conducting an investigation under Article 32, Uniform Code of Military Justice] [officer taking a deposition] [_____] (of) (for) the United States, of which _____ was (military judge) (president) (_____), (and having been directed by the said _____ to qualify as a witness) (and having qualified as a witness and having been directed by the said _____ to answer the following questions put to him as a witness, "_____"), did, (at) (on board) _____, on or about _____ 19__, wrongfully refuse (to qualify as a witness) (to answer said questions). Refusing, wrongfully, to testify

175. In that _____, having been duly restricted to the limits of _____, did, (at) (on board) _____, on or about _____ 19__, break said restriction. Restriction, breaking

176. In that _____, (a prisoner), did, (at) (on board) _____, on or about _____ 19__, wrongfully [use the following (threatening) (insulting) (threatening and insulting) language] Sentinel, lookout, offenses against or by

[behave in (a) (an) (insubordinate) (disrespectful) (insubordinate an
disrespectful) manner] toward _____, a (sentinel) (lookout) in t
execution of his duty, ["_____," or words to that effect] [
_____].

177. In that _____, while posted as a (sentinel) (lookout
did, (at) (on board) _____, on or about _____ 19
(loiter) (wrongfully sit down) on his post.

Soliciting another to commit an offense

178. In that _____ did, (at) (on board) _____,
or about _____ 19__, wrongfully (solicit) (induce) _____
(to disobey a general regulation, to wit: _____) (to ste
_____, of a value of (about) $_____, the property
_____) (to _____), by _____.

NOTE. See Article 82 for certain solicitations which should be charged und
that article.

Stolen property, knowingly receiving, buying, concealing

179. In that _____ did, (at) (on board) _____,
or about _____ 19__, unlawfully (receive) (buy) (conceal
_____, of a value of (about) $_____, the property
_____, which property, as he, the said _____, then w
knew, had been stolen.

Struggling

180. In that _____ did, at _____, on or abo
_____ 19__, while accompanying his organization on (a practi
march) (maneuvers) (_____), without just cause, struggle.

Threat, communicating

181. In that _____ did, (at) (on board) _____,
or about _____ 19__, wrongfully communicate to _____
a threat to (injure _____ by _____) (accuse _____
of having committed the offense of _____) (_____).

Transporting, unlawfully, a vehicle or aircraft in interstate or foreign commerce

182. In that _____ did, (at) (on board) _____
(between _____ and _____) on or about _____
19__, unlawfully transport (a motor vehicle) (an aircraft) in (interstat
(foreign) commerce, then knowing the said (motor vehicle) (aircraft)
have been stolen.

Unclean accouterment, arms, or uniform

183. In that _____ was, (at) (on board) _____,
or about _____ 19__, found with an unclean (rifle) (uniform
(_____), he being at fault in failing to maintain such property
a clean condition.

Uniform, unclean, improper appearing in

184. In that _____ did, on or about _____ 19
wrongfully appear (at) (on board) _____ (without h
_____) (in an unclean _____) (with an uncle
_____) (_____).

Unlawful entry

185. In that _____ did, (at) (on board) _____,
or about _____ 19__, unlawfully enter the (dwelling hous
(garage) (warehouse) (tent) (vegetable garden) (orchard) (staterooms
(_____) of _____.

Weapon, concealed, carrying

186. In that _____ did, (at) (on board) _____,
or about _____ 19__, unlawfully carry a concealed weapon,
wit: a _____.

Wearing unauthorized insignia, decoration, badge, ribbon, or lapel button

187. In that _____ did, (at) (on board) _____,
or about _____ 19__, wrongfully and without authority we
upon his (uniform) (civilian clothing) [the insignia of grade of a (mas
sergeant of _____) (chief gunner's mate of _____)
[the Combat Infantryman Badge] [the Distinguished Service Cross] [t
ribbon representing the Silver Star] [the lapel button representing th
Legion of Merit] [_____].

Wrongful cohabitation

188. In that _____ did, (at) (on board) _____
from about _____ 19__, to about _____ 19__, wrongfu
cohabit with _____, a woman not his wife.

## APPENDIX C

## TABLE OF MAXIMUM PUNISHMENTS

| Article | Offense | Punishment: Dishonorable discharge, forfeiture of all pay and allowances | Punishment: Bad-conduct discharge, forfeiture of all pay and allowances | Punishment: Confinement at hard labor not to exceed— Years | Punishment: Confinement at hard labor not to exceed— Months | Punishment: Forfeiture of two-thirds pay per month not to exceed— Months |
|---|---|---|---|---|---|---|
| 134 | Abusing a public animal | | | | 6 | 3 |
| | Adultery | Yes | | 1 | | |
| | Assault: | | | | | |
| | Indecent | Yes | | 5 | | |
| | With intent to commit voluntary manslaughter, robbery, sodomy, arson or burglary | Yes | | 10 | | |
| | With intent to commit housebreaking | Yes | | 5 | | |
| | With intent to commit murder or rape | Yes | | 20 | | |
| | Bigamy | Yes | | 2 | | |
| | Bribe or graft, accepting, asking, receiving, offering, or promising | Yes | | 5 | | |
| | Burning with intent to defraud | Yes | | 10 | | |
| | Check, worthless, making and uttering (by dishonorably failing to maintain sufficient funds) | | Yes | | 6 | |
| | Correctional custody: | | | | | |
| | Escape from | Yes | | 1 | | |
| | Breach of restraint during | | Yes | | 6 | |
| | Criminal libel | Yes | | 5 | | |
| 134 | Debt, dishonorably failing to pay | | Yes | | 6 | |
| | Disloyal statements undermining discipline and loyalty, uttering | Yes | | 5 | | |
| | Disorderly: | | | | | |
| | In command, quarters, station, camp, or on board ship | | | | 1 | 1 |
| | Under such circumstances as to bring discredit upon the military service | | | | 4 | 4 |
| | Drinking liquor with a prisoner | | | | 3 | 3 |
| | Drugs, habit forming, wrongful possession, sale, transfer, use or introduction into a military unit, base, station, post, ship or aircraft | Yes | | 10 | | |
| | Drugs, marihuana, wrongful possession, sale, transfer, use or introduction into a military unit, base, station, post, ship or aircraft | Yes | | 5 | | |
| | Drunk: | | | | | |
| | Aboard ship | | | | 3 | 3 |
| | In command, quarters, station, or camp | | | | 1 | 1 |
| | Prisoner found | | | | 3 | 3 |
| | Under such circumstances as to bring discredit upon the military service | | | | 3 | 3 |
| | Incapacitating self to perform duties through prior indulgence in intoxicating liquor | | | | 3 | 3 |
| | Drunk and disorderly: | | | | | |
| | Aboard ship | | Yes | | 6 | |
| | In command, quarters, station, or camp | | | | 3 | 3 |
| | Under such circumstances as to bring discredit upon the military service | | | | 6 | 6 |

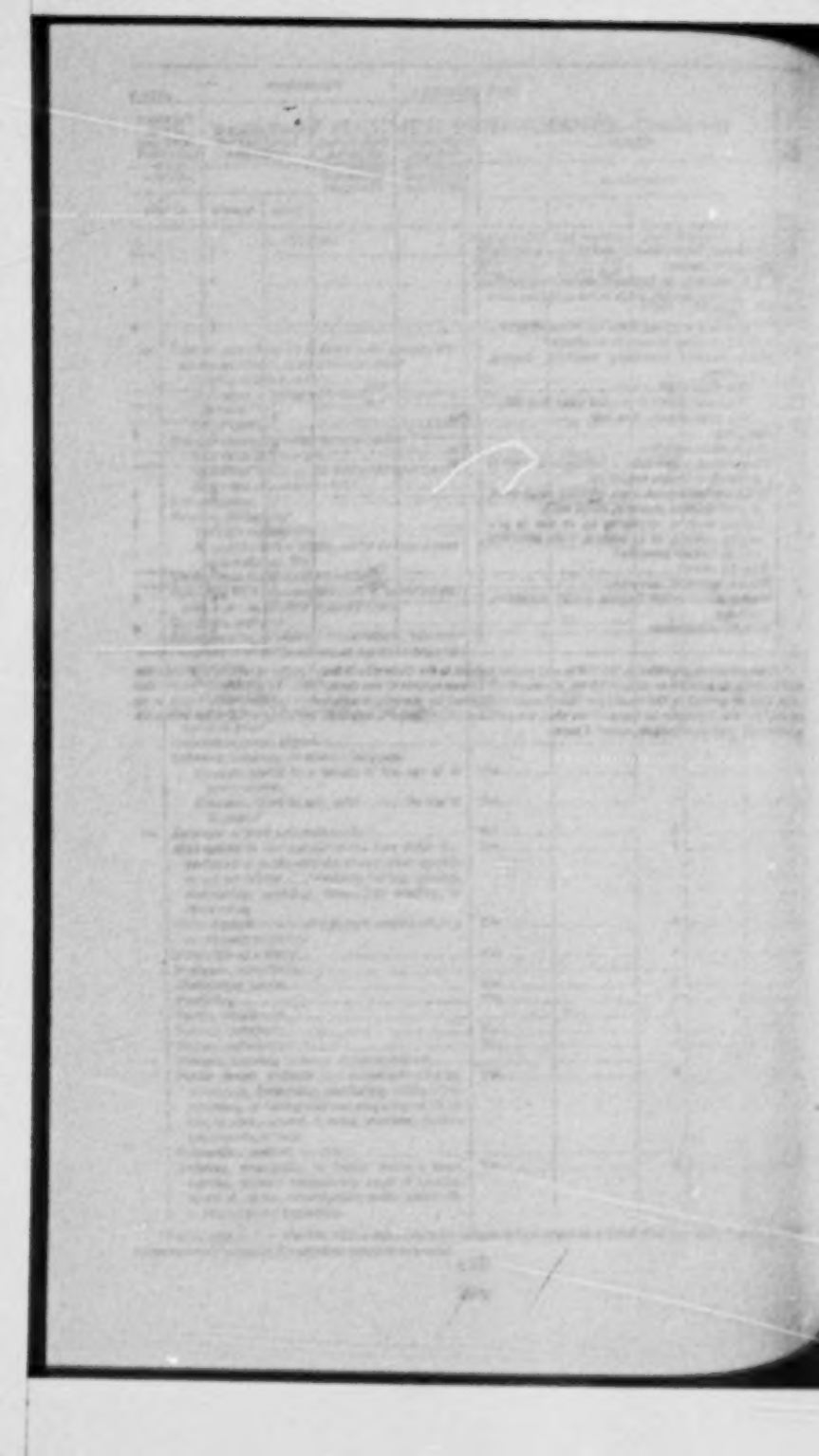
## TABLE OF MAXIMUM PUNISHMENTS—Continued

| Article | Offense | Punishments | | | | |
|---|---|---|---|---|---|---|
| | | Dishonorable discharge, forfeiture of all pay and allowances | Bad-conduct discharge, forfeiture of all pay and allowances | Confinement at hard labor not to exceed— | | Forfeiture of two-thirds pay per month not to exceed— |
| | | | | Years | Months | Months |
| 134 | False or unauthorized military pass, permit, discharge certificate, or identification card: | | | | | |
| | Making, altering, selling | Yes | | 5 | | |
| | Possessing or using with intent to defraud or deceive | Yes | | 3 | | |
| | Other cases | | Yes | | 6 | |
| | False pretenses, obtaining services under: | | | | | |
| | Of a value of $50 or less | | Yes | | 6 | |
| | Of a value of $50 or less and more than $20 | | Yes | 1 | | |
| | Of a value of more than $50 | Yes | | 5 | | |
| | False swearing | Yes | | 3 | | |
| | Firearm, discharging: | | | | | |
| | Through negligence | | | | 3 | 3 |
| | Wrongfully and willfully, under circumstances as to endanger life | Yes | | 1 | | |
| | Fleeing from the scene of an accident | | Yes | | 6 | |
| | Gambling by a noncommissioned or petty officer, with a person of lower military grade | | | | | 3 |
| | Homicide, negligent | | Yes | 1 | | |
| | Impersonating an officer, warrant officer, noncommissioned or petty officer, or agent of superior authority: | | | | | |
| | With intent to defraud | Yes | | 3 | | |
| | All other cases | | Yes | | 6 | |
| | Indecent acts or liberties with a child under the age of 16 years | Yes | | 7 | | |
| | Indecent exposure of person | | | | 6 | 3 |
| | Indecent, insulting, or obscene language: | | | | | |
| | Communicated to a female of the age of 16 years or over | Yes | | 1 | | |
| | Communicated to any child under the age of 16 years.[1] | Yes | | 2 | | |
| 134 | Indecent or lewd acts with another | Yes | | 5 | | |
| | Mail matter in the custody of the Post Office Department or in the custody of any other agency, or not yet delivered or received; taking, opening, obstructing, secreting, destroying, stealing, or detaining | Yes | | 5 | | |
| | Mails, depositing or causing to be deposited obscene or indecent matter in | Yes | | 5 | | |
| | Misprision of a felony | Yes | | 3 | | |
| | Mutinous, committing | | | | 3 | 3 |
| | Obstructing justice | Yes | | 5 | | |
| | Pandering | Yes | | 5 | | |
| | Perjury, violation of | | Yes | | 5 | |
| | Perjury, statutory | Yes | | 5 | | |
| | Perjury, subornation of | Yes | | 5 | | |
| | Prisoner, allowing to do an unauthorized act | | | | 3 | 3 |
| | Public record, willfully and unlawfully altering, concealing, destroying, mutilating, obliterating, removing, or taking and carrying away with intent to alter, conceal, destroy, mutilate, obliterate, remove, or steal | Yes | | 3 | | |
| | Quarantine, medical, breaking | | | | 5 | 3 |
| | Refusing, wrongfully, to testify before a court martial, military commission, court of inquiry, board of officers, investigation under Article 32, or officer taking deposition | Yes | | 3 | | |

[1] See indecent acts or liberties with a child when the offense is so charged as a result of an indecent, insulting, or obscene communication in the physical presence of a child.

| Article | Offense | Punishments | | | |
|---|---|---|---|---|---|
| | | Dishonorable discharge, forfeiture of all pay and allowances | Bad-conduct discharge, forfeiture of all pay and allowances | Confinement at hard labor not to exceed— | Forfeiture of two-thirds pay per month not to exceed— |
| | | | | Years / Months | Months |
| 134 | Restriction, administrative or punitive, breaking | | | 1 | 1 |
| | Restraint or lockup: | | | | |
| | Behaving in an insubordinate or disrespectful manner toward, while in the execution of his duty | | | 3 | 3 |
| | Loitering or sitting down by, while on duty | | | 3 | 3 |
| | Soliciting another to commit an offense,[1] | | | | |
| | Stolen property knowingly receiving, buying, concealing: | | | | |
| | Of a value of $50 or less | | Yes | 6 | |
| | Of a value of $50 or less but more than $50 | | Yes | 1 | |
| | Of a value of more than $50 | Yes | | 3 | |
| | Smuggling | | | 3 | 3 |
| | Threat, communicating | Yes | | 3 | |
| | Transporting, unlawfully, a vehicle or aircraft in interstate or foreign commerce | Yes | | 5 | |
| | Uniform, unclean, appearing in, or not in prescribed uniform, or in uniform worn otherwise than in manner prescribed | | | 1 | 1 |
| | Unlawful entry | | Yes | 6 | |
| | Weapon, concealed, carrying | | Yes | 1 | |
| | Wearing unauthorized insignia, medal, decoration, or badge | | | 6 | 6 |
| | Wrongful cohabitation | | | 4 | 4 |

[1] Unless otherwise provided in the Table, any person subject to the Code who is found guilty of soliciting or inducing another person to commit an offense which, if committed by one subject to the Code, would be punishable under this Table, shall be subject to the maximum punishment authorized for the offense solicited or induced, except that in no case shall the death penalty be imposed nor shall the period of confinement in any case, including offenses for which life imprisonment may be adjudged, exceed 5 years.



Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1973

No. 72-1713

SECRETARY OF THE NAVY,

*Appellant,*

*vs.*

MARK AVRECH,

*Appellee.*

*On Appeal from the United States Court of Appeals for the District of Columbia Circuit*

## BRIEF FOR APPELLEE

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Winthrop, *Military Law and Precedents* (2nd Ed. 1920).

In The

# Supreme Court of the United States

October Term, 1973

No. 72-1713

SECRETARY OF THE NAVY,

*Appellant,*

*vs.*

MARK AVRECH,

*Appellee.*

*On Appeal from the United States Court of Appeals for the District of Columbia Circuit*

## BRIEF FOR APPELLEE

## QUESTIONS PRESENTED

1. Is Article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934, which punishes "all disorders and neglects to the prejudice of good order and discipline in the armed forces, [and] all conduct of a nature to bring discredit upon the armed forces" unconstitutionally vague and overbroad on its face and as applied?

2. Is a court-martial charge of "promot[ing] disloyalty and disaffection" unconstitutionally vague and overbroad?

3. Does a serviceman stationed at an air base in Vietnam have a First Amendment right to express, during off-duty hours, statements of opposition to the war in Vietnam which do not call for any illegal action and are not of such a nature as to result in such action?

## STATEMENT OF THE CASE

### The Facts

Avrech enlisted in the Marine Corps in August, 1967 and was transferred to Vietnam in March, 1969. One evening in April, 1969 while stationed at his base in Danang, he typed a short statement on a stencil which criticized the contribution the South Vietnamese were making toward the war effort and the United States involvement in the war. The statement read as follows:

> "I've been in this country now for 40 days and I still don't know why I'm here. I've heard all the arguments about communist aggression and helping the poor defenseless people. I've also heard this three years ago. The entire Vietnamese Army will switch to a pacification role in 1967 and leave major fighting to the American Troops. (Statement of South Vietnamese Foreign Minister, L. A. Times, Nov. 18, 1966.) It seems to me that the South Vietnam people could do a little for the defense of their country. Why should we go out and fight their battles while they sit home and complain about communist aggression. What are we cannon fodder or human beings? If South Vietnam was willing to go it on their own back in 1964 what the hell is the matter with them now? The United States has no business over here. This is a conflict between two different politically minded

groups. Not a direct attack on the United States. It's not worth killing American boys to have Vietnam have free elections. (Former Vice President Richard M. Nixon, L.A. Times, December 31, 1967.) That was our present leader of this country and now he has the chance to do something about the situation and what happens. We have peace talks with North Vietnam and the V.C. That's just fine and dandy except how many men died in Vietnam the week they argued over the shape of the table? Why does this country think that it can play games with peoples lives and use them to fight their foolish wars, I say foolish because how can you possibly win anything like a war by destroying human lives. Human lives that have no relation at all to the cause of the conflict. Do we dare express our feelings and opinions with the threat of court-martial perpetually hanging over our heads? Are your opinions worth risking a court-martial? We must strive for peace and if not peace then a complete U.S. withdrawal. We've been sitting ducks for too long. ***SAM"[1]

1. Avrech obtained the quotations of the South Vietnamese Foreign Minister and President Nixon, which he used in his statement, from a book entitled "Mission to Hanoi" which was in the PX at Danang (Tr. 32a). This book was available to all servicemen with the apparent sanction and approval of the military authorities. An examination of this book indicates that Avrech excerpted the mildest of comments from the book ignoring far more critical remarks contained therein. See, *e.g.*, comments of Brig. Gen. Robert L. Hughes USAR, "We are prosecuting an immoral war in support of a government that is a dictatorship by design. It represents nothing but a ruling clique and is composed of morally corrupt leaders who adhere to a warlord philosophy," (p. 351). Brig. Gen. William Ford, USA [Ret.] "We are pursuing a war that has no moral or political justification" (pp. 351-352); Gen. David M. Shoup, USCMC [Ret.] "I believe that if we had and would keep our dirty, bloody, dollar-crooked fingers out of the business of these nations so full of depressed, exploited people, they will arrive at a solution of their own" (p. 353).

Avrech then approached Corporal William Jackson, his immediate superior who was in charge of operating the mimeograph machine, and asked him to make copies of the stencil or permit him (Avrech) to do so. Corp. Jackson asked to see the stencil but Avrech refused to show it to him. Corp. Jackson then refused to let Avrech have access to the mimeograph machine (Tr. 25a).[2] Several minutes later Corp. Jackson noticed Avrech typing up the heading on the stencil. He approached him picked up the stencil from the table, and read it.[3] When Corp. Jackson told Avrech that he was going to retain the stencil, Avrech asked him not to allow other people to read it (Tr. 28a). The next day Corp. Jackson turned the stencil over to a superior officer.

Based upon the incident Avrech was charged with violating Article 134 of the Uniform Code of Military Justice (hereinafter "UCMJ"), 10 U.S.C. § 934, by publishing to members of the Armed Forces of the United States a statement "disloyal to the United States" "with design to promote disloyalty and disaffection among the troops" (App. 4-5).[4] Avrech was also charged under Article 80, 10 U.S.C. § 880, with an attempt to commit that offense (App. 3-4).

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Avrech pleaded not guilty to both charges. At his court-martial Avrech testified that in drawing up the statement he only intended to put his views down on

2. "Tr." refers to the summarized record of the trial, reprinted in the Appendix to the briefs in the Court of Appeals.

3. Cpl. Jackson testified as follows:

> "He [Avrech] did not solicit my reading it [the stencil] . . . He said here it is if you want to read it. I took it and read it. In a sense I guess you could say that I took it from him" (Tr. 28a).

4. "App." refers to the Appendix filed with this Court.

paper and to distribute 8-10 copies to friends with whom he had previously discussed the war in private (Tr. 36a, 37a). He stated that he was not disloyal to the United States, that he did not consider his statement to be disloyal and that it was not his intent to be disloyal to the government of the United States (Tr. 34a, 39a).

Avrech also presented testimony from other servicemen with whom he had held discussions about the war. They testified that statements similar to those in the stencil had been made by Avrech previously and that such statements did not in any way affect their conduct or their attitude toward the Marine Corps or their duty (Tr. 48a, 51a). These servicemen, including Corp. Jackson further testified that Avrech had never advised any of them to desert or refuse to perform their work (Tr. 28a, 45a). The prosecution presented no evidence to the contrary. [5]

At the conclusion of the trial, Avrech was acquitted of publishing the statement but convicted of the attempt to publish. He was sentenced to a reduction in rank, forfeiture of three months pay and confinement at hard labor for one month. The convening authority suspended the confinement portion of the sentence. The Staff Judge Advocate and the Judge Advocate General of the Navy then approved the findings and the sentence. [6]

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5. The government states in its brief (6) that "a witness for the government, however, testified that Avrech had stated earlier that it [the statement] was disloyal." This witness was Captain Mockenhupt. The government's summary of his testimony is incomplete. Captain Mockenhupt who was appointed the investigating officer in the case testified that Avrech initially told him the statement was not disloyal in any respect but that after he (Capt. Mockenhupt) reiterated to Avrech that it was disloyal, Avrech finally acquiesced in this characterization of his statement (Tr. 52a). Avrech denied he ever acknowledged to Capt. Mockenhupt that the statement was disloyal (Tr. 55a).

6. The Judge Advocate General of the Navy was the highest authority within the military with jurisdiction to review appellee's conviction.

## The Proceedings Below

Following his discharge from the Armed Forces,[7] Avrech brought suit in the District of Columbia, seeking a declaratory judgment that his court-martial conviction was invalid and an order requiring the Secretary of the Navy to expunge the conviction from his military records and to restore to him all pay and benefits lost by reason of his conviction. He alleged in his complaint that Article 134 was unconstitutional on its face and as applied and that his conduct was protected by the First Amendment.

The District Court granted the government's motion for summary judgment holding that Article 134 was not unconstitutionally vague and that Avrech's statement was not protected by the First Amendment (J.S. App. B, 27-28, J.S. App. C, 29-34). The Court of Appeals, in an unanimous opinion written by Mr. Justice Clark, reversed. The opinion briefly reviewed the history of Article 134 and noted its use by the military to encompass a wide range of unrelated offenses. It stated that

> "[b]oth clauses[8] have been expanded beyond recognition and now encompass the residue of offenses that have sprung up with what were thought to be the necessities of disciplining the ever-increasing population of the armed forces" (J.S. App. A, 18).

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7.. On June 26, 1970 Avrech was discharged from the Marine Corps with a bad- conduct discharge after a second and unrelated court-martial conviction. The Navy Court of Military Review took into consideration Avrech's conviction for disloyalty in determining the type of discharge he was to be given.

8. "All disorders and neglects to the prejudice of good order and discipline in the armed forces" and "all conduct of a nature to bring discredit upon the armed forces."

The opinion concluded by holding that

> "Article 134 gives no fair warning of the conduct it proscribes and fails to provide any ascertainable standard of guilt to circumscribe the discretion of the enforcing authorities" (J.S. App. A, 20).

Rejecting the government's contention that civilian standards of specificity did not apply to the military (J.S. App. A, 23), the court below held that the Article was unconstitutionally vague.[9]

## SUMMARY OF ARGUMENT

### I

Neither of the first two clauses of Article 134 meet current constitutional standards for they do not provide fair warning to servicemen of the conduct proscribed by the Article nor do they set forth explicit standards to guide the enforcing authorities. This Court has frequently held statutes containing language similar to that in Article 134 to be unconstitutionally vague.

The history of the first clause of Article 134 ("all disorders and neglects to the prejudice of good order and discipline") demonstrates that it was intentionally drafted to be vague and undefined and was so recognized by numerous British and American military commentators. The second clause ("all conduct of a nature to bring discredit upon the armed forces") was added to the Article in 1916 for the single purpose of covering retired

9. The opinion of the court below did not discuss either of the other two issues presented to it, *i.e.*, the vagueness of the disloyalty specification and whether Avrech's statement was protected by the First Amendment.

noncommissioned servicemen. This clause has also been recognized to be vague and it has been expanded to cover a whole range of offenses committed by servicemen on active duty.

The military has used Article 134 as an open-ended statute to cover all conceivable offenses committed by servicemen. There is absolutely no common understanding or practice which underlies the miscellaneous offenses charged under the Article, and the military itself at times disagrees as to which offenses fall within the Article. The listing of offenses in the Manual for Courts Martial amounts to the exercise of a legislative function by the military. Moreover, the list does not provide fair warning to servicemen because (1) new and unrelated offenses are constantly being added to the list while other offenses are eliminated; (2) servicemen are prosecuted for acts not set forth in the list; and (3) the listing of an offense does not necessarily mean that a serviceman will violate Article 134 if he commits that offense.

The government contention that, despite the obvious invalidity of Article 134 on its face this Court should not reach that question, is not justified by precedent and would effectively overrule a long string of cases in this Court in which the validity of statutes were considered on their face.

## II

Article 134 is capable of being construed, and has been construed, to cover the First Amendment area. Since the Article reaches constitutionally protected activity it is unconstitutionally overbroad. The government's argument that this Court should not declare the statute overbroad because it covers non-speech as well as speech activity conflicts with the rationale underlying this Court's

doctrine of overbreath. Further, the concessions made by the government require a holding that Article 134 is overbroad.

## III

The word "disloyal", used in the court martial charge, is vague and overbroad and has been so recognized by the only federal court to deal explicitly with the issue. *Stolte v. Laird*, 353 F. Supp. 1292 (D.C.D.C. 1973). The Manual for Courts Martial does not define the words "disloyal statements" but merely gives examples of what constitutes such statements. These examples are themselves vague. The highest military court has defined the term "disloyalty" to mean "lack of allegiance to the United States" but this definition is itself vague. In any event, appellee's statement was merely an expression of opposition to this country's policy in Vietnam and did not amount to a "lack of allegiance to the United States."

## IV

This Court has made abundantly clear that speech may be curtailed only under very narrow circumstances, and most recently has held that speech may be prohibited only where it is directed toward inciting and is likely to incite lawless action. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). There is no reason why this test should not be applied in judging when speech by servicemen may be prohibited. Judged by this test appellee's statement was protected by the First Amendment. His statement did not mention or suggest a call to illegal action nor was it intended to incite disobedience, and no evidence to the contrary was introduced at his court-martial. Servicemen should be allowed to express their personal opinions on issues during

off-duty hours. They are already exposed to a vast array of views in the books and magazines which are readily available to them.

## ARGUMENT

### POINT I

### ARTICLE 134 OF THE UNIFORM CODE OF MILITARY JUSTICE IS UNCONSTITUTIONALLY VAGUE.

Since 1921 this Court has consistently held that vague penal statutes are unconstitutional. See, *e.g.*, *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921); *Connally v. General Construction Co.*, 269 U.S. 385 (1926); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *United States v. Harriss*, 347 U.S. 612 (1954); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), this Court summarized the principles underlying its numerous holdings that vague laws are unconstitutional when it stated:

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with

> the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [these] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Id.* at 108-109 (footnotes omitted).[10]

We shall show that Article 134 because of its language, its history, and its application by the military violates all three of these values.[11]

## A. The Language of Article 134.

The present case involves the first two clauses of Article 134 which punish "all disorders and neglects to the prejudice of good order and discipline" and "all conduct of a nature to bring discredit upon the armed forces."[12]

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10. The government in its brief consistently assumes that the only basis for this Court's holdings on vagueness lies in the first value, *i.e.*, that fair warning be provided to those subject to the law, and it analyzes Article 134 solely in those terms. As we show, *infra*, pp. 41-47, its analysis even on those limited terms does not meet constitutional standards. However, at no point in its brief does the government show any recognition of the second value, *i.e.*, that explicit standards must be provided to avoid arbitrary and discriminatory enforcement by those who apply the law.

11. The government argues (Br. 10-12) that the Court of Appeals improperly determined the question of the constitutionality of Article 134 on its face and that this Court should limit its inquiry to the constitutionality of the Article as applied to the peculiar facts of this case. We treat with this contention, *infra*, pp. 27-29.

12. The charge against the appellee here did not specify which of the first two clauses of Article 134 were allegedly violated. Thus if either one of these two clauses is unconstitutionally vague appellee's conviction must be overturned. *Bachellar v. Maryland*, 397 U.S. 564 (1970); *Stromberg v. California*, 283 U.S. 359 (1931).

There can be no question that in light of the decisions of this Court neither of these phrases, on their face, meets current constitutional standards.

This Court has invalidated statutes whose operative words were almost identical to those contained in the first clause of Article 134. In *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969), this Court struck down a city ordinance which gave the City Commission power to refuse permits on the grounds *inter alia*, of "public welfare," "decency," "good order," "morale or convenience." This, the Court held,

> "... conferred upon the City Commission virtually unbridled and absolute power to prohibit any 'parade,' 'procession,' or 'demonstration' on the city's streets or public ways. For in deciding whether or not to withhold a permit, the members of the Commission were to be guided only by their own ideas of 'public welfare, peace, safety, health, decency, good order, morale, or convenience.'" 394 U.S. at 150.

Other decisions of this Court have invalidated statutes employing standards such as "general welfare," *Staub v. City of Baxley*, 355 U.S. 313 (1958); "misconduct", *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966); conduct that was "annoying", *Coates v. Cincinnati*, 402 U.S. 611 (1971); "reprehensible", [13] *Giaccio v. Pennsylvania, supra;* or "prejudicial to the best interests of a city", *Gelling v. Texas*,343 U.S. 960 (1952). Other federal courts have voided statutes whose operative words were "discipline", *Alexander v. Thompson*, 313 F.Supp. 1389 (C.D. Calif.

13. Military courts have used this word to describe conduct proscribed by Article 134. *United States v. Lee*, 4 CMR 185, 191 (ABR 1952), "reprehensible conduct"; see, *United States v. Rio Poon*, 26 CMR 830, 833 (CGBR 1958), "universally reprehended."

1970); "immorality", *Burton v. Cascade School District*, 353 F.Supp. 254 (D. Oregon 1973) or which penalized "offensive", *Pritkin v. Thurman*, 311 F.Supp. 1400 (S.D. Fla. 1970); "immoral", *Ricks v. District of Columbia*, 414 F.2d 1097 (D.C. Cir. 1968) or "demoralizing", *Oestreich v. Hale*, 321 F.Supp. 445 (E.D. Wis. 1970) conduct.

Equally undisputed is the vagueness of the language of the second clause, "all conduct of a nature to bring discredit on the armed forces." See Note, *The Discredit Clause of the UCMJ: An Unrestricted Anachronism*, 18 U.C.L.A. L.Rev. 821 (1971). As one military author has stated, "the words 'of a nature to bring discredit' mean no more than that the act is one customarily regarded as reprehensible." Hagan, *The General Article — Elemental Confusion*, 10 Mil. L. Rev. 63, 104 (1960). The vagueness of the word "discredit" was recognized in *Flynn v. Giarrusso*, 321 F.Supp. 1295 (E.D. La. 1971), which struck down, on its face, a regulation requiring a policeman to act in a manner which will not "reflect discredit upon himself or the Department." *Id.* at 1300. Significantly, the government here makes no effort to defend this clause against a charge of vagueness. Indeed a reading of its brief fails to reveal any recognition that this second clause is even present in Article 134.

There can be no argument that taken on its face the language of Article 134 is vague.[14] Both the government here (Br. 15) and the Court of Military Appeals in *United States v. Frantz*, 2 USCMA 161, 163, 7 CMR 37, 39 (1953), concede as much contending only that the Article has acquired a settled meaning as a result of custom and

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14. We deal elsewhere with the vagueness of the court-martial charge of "disloyal statements," *infra*, Point III.

practice, an argument with which we show below, *infra*, to be without merit. [15]

## B. The History of Article 134. [16]

The history of these two clauses demonstrates tha they were purposely written to be vague, and wer uniformly recognized as such by military commentator The only apparent purpose of these clauses, as Mr. Justic Clark noted below, was "to act as a catchall for varie types of unforeseen misconduct not otherwise covered b the Code" (J.S. App. A, 20).

### *1. "Disorders and Neglect to the Prejudice of Goo Order and Discipline."*

Article 134 has formed part of the American militar code since 1775, and its language, except for the additio in 1916 of the phrase "all conduct of a nature to brin discredit upon the armed forces" has remained virtuall

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15. The only commentator cited by the government for t validity of Article 134 is Weiner, *Are the General Military Articl Unconstitutionally Vague*, 54 A.B.A.J. 357 (1968). As Justice Cla specifically noted (J.S. App. A. 21), Weiner recognized that th language of the Article was "unduly indefinite." Weiner's thesis w that despite this the Article could pass constitutional muster becau it acquired a settled meaning. As we show below, there is nothing i the history and application of the Article to support this contentio

16. The government's version of the history of Article 134 (B 13-14) is a once over lightly listing of dates without any discussio or consideration of the purpose of the Article and the manner i which it was employed by the military. The government refers (B 14, fn. 8) to Weiner as a source for the legislative history of th Article. However, Weiner merely sets out the date when Article 1 was first adopted and the dates of its subsequent revisions. He sho no recognition of the historical material set out herein and even h knowledge of the narrow legislative history is faulty. See, *infra*, 22.

unchanged since that time.[17] The Article was modeled upon the British Articles of War[18] which date back at least to 1688.[19]

British military writers uniformly recognized that the Article was vague and undefined.[20] One of the earliest military commentators who wrote a treatise on military

17. When the Continental Congress first enacted the Articles of War in 1775, this Article was Article 50. In the revision of 1776, it became Section 18, Art. 5. It was retained virtually unchanged in the revisions of 1806, 1874, 1916 (except for the addition of the second clause) and 1920. The texts of these articles can be found in Winthrop, *Military Law and Precedents* (2nd Ed. 1920).

18. John Adams, *Life and Autobiography*, Vol. III, pp. 68-69. John Adams was chairman of the Committee of Congress charged with drafting the Articles of War of 1776.

19. The British equivalent of Article 134 dates back, at least, to Article 64 of the Articles of War of King James II of England. Section 20, Art. 3 of the British Articles of War of 1765, which were in force at the beginning of the American Revolution punished "all crimes not capital and all disorders and/or neglects officers and soldiers may be guilty of to the prejudice of good order and military discipline."

20. The available evidence indicates that at one point in history the words "disorders" and "neglect" had a more precise meaning than they have today. William Hough, the noted British military commentator, in his work *The Practice of Courts-Martial* (1825), although he did not define "disorders" did characterize them as acts that "more usually take place under circumstances unconnected with duty and are esteemed disorderly or insubordinate conduct." *Id.* at 634. He listed as examples habitual insubordinate language and conduct at the mess, drunkenness, and abusing and striking a soldier on duty. *Id.* at 642. "Neglect" was defined as "neglecting to observe standing orders and regns, or those orders which are issued and intended to be carried into immediate execution or shortly after." *Id.* at 633. As examples of acts falling under this category, Hough listed keeping the books in a negligent manner, not reporting infectious diseases to a commanding office and allowing goods to be stolen. *Id.* at 641-642.

(Cont'd)

law acknowledged that the Article granted to courts martial

> "Almost an unbounded jurisdiction . . . to declare what shall amount to the crimes in contemplation, and what the quantum of punishment assignable to them; governed not in anything but by its own discretion." E. Samuels, *An Historical Account of The British Army and the Law Military* (1816), p. 686.

Major General Vans Kennedy, cited in *A Treatise on the Principle and Practice of Military Law* (1847), acknowledged that "it will be obvious that there is scarcely any impropriety of conduct or irregularity which an officer or soldier may commit, that is not brought under" this Article, *Id.* Act 34, while Colonel James Pipon, in his *Manual of Military Law* (3rd Ed. 1863) stated that "the wide terms in which this Article is couched make it capable of its being construed to include every crime or offense of which a soldier may be guilty." *Id.* at 89. Major General Charles Napier argued that the lack of precision and failure to clearly define crimes in the Articles of War was a virtue which should be preserved, and that Article 134 was "the most useful" of all the Articles in this respect. *Remarks on Military Law* (1837), p. 59. Indeed the very vagueness of the Article caused it to be popularly known as the "Devil's Article." Charles Clode, *Administration of Justice Under Military and Martial Law* (1874), p. 12. [21]

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We have found no evidence to indicate at what point the meaning of these words was expanded to cover offenses, such as the present, which on their face do not fall within the category of either a "disorder" or a "neglect".

21. Today the Article is known by its equivalent as "Catch-22," Note, *Taps for the Real Catch-22*, 81 Yale L.J. 1518 (1972).

American military writers agreed with their British counterparts respecting the vagueness of this Article. In his *Treatise on Military Law* (1846), Lieutenant John O'Brien referred to the General Article in the following terms:

> "The power confided to military courts is certainly very large, and not limited with great precision . . . .The general misbehaviors and neglects contemplated by the article are too numerous to be reckoned, and of too mixed, unsettled, and changeable a character to be in all instances delineated. From the very necessity of the case they must, in many instances, remain undefined." *Id.* at 164.

A later military commentator agreed, noting that the Article "is an apparent exception to the rule that offenses against the United States must be exactly described in the statutes creating them." Davis, *A Treatise on the Military Law of the United States* (1915), p. 473.

*2. "All Conduct of a Nature to Bring Discredit Upon the Armed Forces."*

Unlike the first clause of Article 134, this second clause is of relatively recent vintage. It was initially added to the General Article in 1916 because of the view that neither the first clause of Article 134 nor the precedessor of Article 133, 10 U.S.C. § 933, covered retired noncommissioned servicemen and the military believed it necessary to have a catch-all provision to cover offenses committed by such servicemen. The then Judge Advocate General of the Army, General Enoch Crowder stated as follows with respect to this clause: [22]

22. Weiner erroneously states in his Article (54 A.B.A.J. at 358, fn. 7) that General Crowder never set forth the reasons for the enactment of this clause.

> "That was inserted for a *single purpose*. We have great many retired noncommissioned officers and soldiers distributed throughout the body of our population and a great many retired officers. If the retired officer does anything discreditable to the service or to his official position we can try him . . . for 'conduct unbecoming an officer and a gentlemen.' We cannot try the noncommissioned officer or soldier under that article, nor can we try him for conduct prejudicial to the good order and military discipline; because the act of a man on the retired list, away from any military post, cannot be reasonably said to affect military discipline. I threw in that language to cover the cases of these men. . . . Only the small class of men that I have spoken of [retired non-commissioned servicemen] could be tried under it [the second clause], for the soldier on the active list is covered by other articles." (Emphasis added.) *Hearings Before the Subcommittee of the House Committee on Military Affairs on H.R. 23628*, 62nd Cong. 2nd Sess. (1912), pp. 83-84. [23]

In the ensuing colloquy with Representatives Hughes and Kahn, General Crowder acknowledged that the scope of the clause was broad.

> "Mr. Hughes: This language 'all conduct of a nature to bring discredit upon the military service' seems to include everything?
>
> Gen. Crowder: It was inserted for that purpose

23. Hearings on the revisions of the Articles of War were held beginning in 1912 and this clause was first proposed at that time. The clause was contained in subsequent proposals which were the subject of additional hearings in 1916. The actual revision of the General Article was adopted in 1916 as part of a revision of the Articles of War.

Mr. Kahn: It is like the catch-net language of the tariff bills.

Gen. Crowder: Yes. It is not of the greatest importance, but it would relieve the service of considerable embarrassment to have that language retained."

Despite the purpose for which it was originally enacted this clause has been expanded to cover offenses committed by servicemen on active duty,[24] and the scope of the offenses covered, both for retired servicemen and those on active duty, are seemingly limitless. The inherent vagueness of this clause and its expanded meaning were acknowledged in the Legal and Legislative Basis of the Manual for Courts-Martial (1951)[25] which noted:

"By judicial interpretation these 'vague words' have since been expanded from the narrow

24. The expansion of the original scope of this clause by the various Manuals for Courts-Martial can be easily traced. The Judge Advocate General's "single purpose" of the clause [to cover retired noncommissioned servicemen] became the "principal object" (1917 Manual, Par. 446), which became "another principal object" (1921 Manual, Par. 446), and finally turned into "one object" (1928 Manual, Par. 1526). See, generally, Hagan, *The General Article — Elemental Confusion*, 10 Mil. L. Rev. 63, 75-76 (1960).

25. The preface to the Legal and Legislative Basis for the Manual for Courts- Martial (1951) states:

"This pamphlet contains a short history of the preparation of the Manual for Courts-Martial, United States, 1951, together with brief discussions of the legal and legislative considerations involved in the drafting of the book. With minor exceptions, the discussions of the various subjects were written by the officers who prepared the initial drafts of the comparable portions of the manual."

> construction placed on them by their author to the point where they have been used as the legal justification to sustain convictions for practically any offense committed by one in the military service which is not either specifically denounced by some other article, or is not a crime or offense not capital or a disorder or neglect to the prejudice of good order and discipline." *Id.* at 295.

The same document describes the phrase "conduct of a nature to bring discredit upon the armed forces" as the "catch-all" in military law. *Id.* at 294.

The broad reach of Article 134 and the unlimited discretion it gives to the military has been recognized by legislators and military officers. For example, the exchange between Senator Chamberlain and Major J. E. Runcie during the hearings in 1919 on the revision of the Articles of War is illuminating:

> "Senator Chamberlain: . . . As I read that Article [the predecessor of Article 134] there is not a thing under the sun that has anything to do with the military establishment that can not be denounced as a military offense and punishable by a commanding officer.
>
> Major Runcie: By a court, and with the approval of the commanding officer.
>
> Senator Chamberlain: In the last analysis it is the same thing.
>
> Major Runcie: Yes, it is. That article will cover any statement of facts which the authority which convenes the court chooses to regard as a military offense, although legally there is not one element

of a military offense in it." *Hearings on S.64 Before the Subcommittee of the Senate Committee on Military Affairs*, 66 Cong. 1st Sess. (1919) p. 36. [26]

Colonel Edmund Morgan, who later became Chairman of the Committee which drafted the Uniform Code of Military Justice, expressed the same sentiments when he stated:

> "And the usual uncertainty of the specific punitive articles is made more uncertain by the so-called general article, which denounces 'all disorders and neglects to the prejudice of good order and military discipline and all conduct of a nature to bring discredit upon the military service.' What constitutes such disorder, neglect, or misconduct depends upon the commanding officer, the court, or the reviewing authority as the case may be. What one officer may consider an offense, another may entirely overlook. What a particular officer may deem a violation of this article if done on Monday, he may regard as immaterial if committed on Tuesday. There is no legal test and no legal method of enforcing any alleged or supposed test." Address by Col. Edmund Morgan before the Maryland State Bar Assn., June 26, 1919, placed into the record at the end of his testimony at the *Hearings on S. 64, supra* at 1389.

During the hearings which led to the adoption of the UCMJ in 1950, the same view of Article 134 was expressed by Felix Larkin, Asst. Gen. Counsel in the Office of the Secretary of Defense and Executive Secretary of the Committee which drafted the Code:

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26. See also the testimony of Brigadier General Samuel Ansell at the same hearings. *Id.* at 268.

> "Mr. Larkin: . . . To accuse a man of violating Article 96 [now Article 134] does not necessarily tell him very much because it is an article which makes conduct to the prejudice of good order and discipline and things of that character an offense.
>
> Mr. Books: It is a catch-all, is it not?
>
> Mr. Larkin: That is right. So while the other punitive articles set out specific offenses of robbery, burglary, and so forth, that one does not. Of course, when the man is served with formal charges and specifications he is told what act he is alleged to have committed." *Hearings Before a Subcomm. of the House Committee on Armed Services*, 81st Cong. 1st Sess. (1949), p. 912. [27]

More recently the Chief Judge of the United States Army Court of Military Review acknowledged that the vagueness of Article 134 was so clear that "it probably could not withstand a 'vague and indefinite' attack in the Supreme Court." Major General Hodson, *Perspective, The Manual for Courts-Martial 1984*, 57 Mil. L. Rev. 1, 12 (1972). Other commentators have echoed the same view. See, for example, Note, *Taps for the Real Catch-22, supra*; Graynor, *Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article*, 22 Hasting L.J. 259 (1971); Note, *The Discredit Clause of the UCMJ: An Unrestricted Anachronism*, 18 UCLA L. Rev. 821 (1971); Hagan, *The General Article–Elemental Confusion, supra*; Everett, *Article 134, UCMJ - A Study in Vagueness*, 37 North Carolina L. Rev. 142 (1959).

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27. During the same colloquy, Senator Smart stated that "conduct to the prejudice of good order" was a "shotgun statement" which "certainly is not telling him [the serviceman] much." *Ibid.*

## C. The Use of Article 134 by the Military.

The application and construction of Article 134 since the adoption of the Uniform Code of Military Justice has demonstrated that the military has continued to regard this Article as open-ended and available to cover any conceivable offense committed by servicemen. As Mr. Justice Clark so aptly noted below, the Manual lists a "crazy quilt of offenses" (J.S. App. A, 19) ranging from abusing a public animal to wrongful cohabitation and including such miscellaneous offenses as criminal libel, dishonorably failing to pay a debt and pandering. [28]

It is clear that the enumeration of miscellaneous offenses in the Manual is neither all-inclusive nor definitive. The former is demonstrated by the fact that the military has used Article 134 to charge servicemen with a wide range of acts not listed in the Manual and which have no common characteristics. [29] Thus the Legal and Legislative Basis for the Manual states that whether or not a particular offense is listed in the Manual

> "is not what makes an act an offense . . . There are necessarily many other acts which may constitute

28. The 1969 Manual lists over sixty sample specifications of offenses which allegedly are covered by Article 134.

29. Even before the adoption of the UCMJ servicemen were charged with a wide range of miscellaneous offenses. Acts which were charged under Article 134 included failing to register at a hotel and refusing to have one's teeth fixed. Karen, *The Personal Factor in Military Justice*, 1946 Wisc. L.Rev. 394, 402. The author, a former officer in the Judge Advocate General Dept. of the Army's Infantry Div., stated that Articles 133 and 134 were "wide and elastic enough to include almost any meaning which the men interpreting them desire." *Id.* at 398.

> disorders or neglect, or conduct discreditable to the armed forces which are not discussed or covered by any sample specification." *Id.* at 296.

Thus Article 134 has been held to penalize bestial acts with a chicken, *United States v. Sanchez*, 11 USCMA 216, 29 CMR 32 (1960); window peeping in a trailer park, *United States v. Clark*, 22 CMR 888 (AFBR 1956), *pet. denied*, 22 CMR 331 (1956); cheating while calling bingo numbers, *United States v. Holt*, 7 USCMA 617, 23 CMR 81 (1957) and an officer's drinking with an enlisted man, *United States v. Livingston*, 8 CMR 206 (ABR 1952), *pet. denied*, 8 CMR 178 (1953).[30] In one opinion the Court of Military Appeals has indicated that it was necessary to keep Article 134 open-ended so as to match the ingenuity of servicemen who apparently may commit new offenses which the military authorities never thought of punishing. Thus in holding that placing objects in the duct of a jet aircraft violated Article 134, the court stated:

> "Since jet engines have been installed in United States aircraft only since World War II, what the appellant did in this instance has no prolonged history as a military offense. As military doctrine and weapons change, however, some new military offenses necessarily develop." *United States v. Martinson*, 21 USCMA 109, 44 CMR 163, 164 (1971).

Moreover, each successive edition of the Manual contains a different list of offenses which allegedly constitute violations of Article 134. New offenses, not previously listed, are added while other offenses,

30. Attached hereto as Appendix A is a sample list of acts with which servicemen have been charged since 1951 under the first two clauses of Article 134 even though those acts were not listed in the Manual as offenses at the time they were committed.

previously set forth, are eliminated. Aside from the listing itself, nowhere does there appear any rationale, explanation or statement as to why some offenses are added and others are eliminated. So far as one can tell from any published material the decision to add or drop offenses is taken somewhere in the deep recesses of the Pentagon.

A good example of the use of Article 134 to cover offenses according to what appears to be the whim and caprice of the Pentagon is the specific charge of disloyalty brought against the appellee in the instant case. The making of a "disloyal" statement was not listed in the 1895, [31] 1898, 1901, 1908, 1917, 1921, 1928 or 1943 Manuals for Courts-Martial as coming within the coverage of Article 134. The legislative history relating to the adoption of the Uniform Code of Military Justice contains no reference to "disloyal statements" as coming within Article 134. The first reference to "disloyal statements" as being an offense under Article 134 appears in the 1951 Manual. There is no explanation of the source or origin for this entry. The Legal and Legislative Basis of the Manual for Courts-Martial, in commenting on the Table of Maximum Punishment of the 1951 Manual, simply states that "uttering disloyal statements undermining discipline and loyalty is a *new* entry." *Id.* at 201 (emphasis added). [32]

The 1969 Manual continued the usual practice of haphazardly adding and eliminating offenses. Thus, criminal libel, obstructing justice and wrongful cohabitation were added while others, such as lending money at usurious interest, were eliminated.

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31. This, we believe, was the earliest Manual.

32. At the same time a new entry "concerning bribes and grafts" was added. Legal and Legislative Basis at 201. The same document notes that "The entry in the 1949 Manual 'Allowing a prisoner to

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Further, some offenses have been held to fall within the ambit of Article 134 under the theory of analogizing them to other offenses. See, *e.g.*, *United States v. Alexander*, 3 USCMA 346, 12 CMR 102 (1953). The practice of analogizing offenses, as Mr. Justice Clark observed below (J.S. App. A., 21), was condemned by this Court in *Papachristou v. City of Jacksonville*, *supra* at 168-169. See generally Everett, *Article 134 UCMJ - A Study in Vagueness*, *supra*.

In addition, servicemen have been convicted of violating Article 134 even when their acts were originally charged under another Article of the Code, and the proof failed to sustain the original charge. Thus, for example, in *United States v. Williams*, 4 CMR 801 (AFBR 1952) the court held that a serviceman charged with larceny in violation of Article 121, 10 U.S.C. § 921 could be convicted under Article 134 for "wrongful taking" when the requisite intent for larceny was absent. *Id.* at 807. In another case, a serviceman, charged with malingering under Article 115, 10 U.S.C § 915, was convicted under Article 134 for having intentionally injured himself by cutting his arm with a razor blade, *United States v. Taylor*, 17 USCMA 595, 38 CMR 393 (1968). [33]

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receive or obtain intoxicating liquor' has been deleted, but a more comprehensive entry has been substituted, 'Prisoner, allowing to do an unauthorized act.' " *Ibid.*

33. In *United States v. Davis*, 27 CMR 908 (CGBR 1958) a serviceman was charged with destroying military property in violation of Article 108, 10 U.S.C. Section 908, but convicted under Article 134 for having removed fuses from a fuse box without authority. The Court reversed the conviction because the act of removing fuses from a fuse box was neither listed in the Table of Maximum Punishments nor in the Manual's model specifications. Apparently sometimes the failure to list acts in the Manual excludes those acts from the coverage of Article 134 and sometimes it does not.

## D. The Government's Contentions

*1. Article 134 Should Not Be Judged On Its Face.*

We have established that Article 134 is unconstitutionally vague because of its language, its history, and its use by the military and that this vagueness was intentional and deliberate. Justice Clark, writing for the court below, found to the same effect. The government here contends (Br. 11, 20-23) that the court below should not have, and this Court should not, address themselves to the issue of the validity of Article 134 if it can be established that Avrech "was, or should have been aware" that his conduct "was a kind of action that Article 134 clearly prohibits." (Br. 11) [34]

The principal authority relied on by the government for this contention is *United States v. National Dairy Corp.*, 372 U.S. 29 (1963). The author of the opinion in *National Dairy* was Mr. Justice Clark who wrote the opinion below, and although that case was cited to him by the government, he did not consider that it had any application to the instant case. It is easy to see why. In *National Dairy*, this Court was confronted with a statute whose history indicated that Congress clearly intended the particular act involved (selling below cost) to be included within the statute's coverage. The government here points to no history showing that Avrech's conduct was intended to be covered by Article 134. On the contrary, since Article 134 is so vague and broad that it can cover any conduct that the military does not like, it is an example of a "blunderbuss" statute which Justice Clark in *National*

34. The military tribunals made no finding that Avrech was aware his activity was illegal. Moreover, as we show below, *infra*, pp. 58-59 government counsel's expressed "belief" (Br. 11) for such awareness rests on questionable assumptions.

*Dairy* stated would be invalid on its face without regard to the specific conduct charged as an offense under the statute. Justice Clark stated "This is not to say that a bead-sight indictment can correct a blunderbuss statute, for the latter itself must be sufficiently focused to forewarn of both its reach and coverage. *Id.* at 33. [35]

The other case chiefly relied upon by the government (Br. 22), *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), lends even less support to its contentions. In the first place that case did not involve a penal statute. Secondly, the statute there explicitly condemned the conduct engaged in by the parties who were complaining of the statute's validity. Their contention was solely that other sections of the statute not applicable to their conduct could be construed to cover protected political expression. This Court held that it would not entertain the challenge to these other sections. The Court made the same holding in *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973), also relied upon by the government (Br. 21-22). Here, on the contrary, Avrech is not complaining of the validity of portions of Article 134 which were not applied to him. He is contending that the specific phrases which served as a basis for punishing his conduct (*i.e.*, all disorders and neglects to the prejudice of good order and discipline and all conduct of a nature to bring discredit upon the armed forces) are invalid. Thirdly, in *Broadrick* this Court expressly sustained the statute because it found that Congress had made a "considered legislative judgment" that the conduct in question was to be proscribed. 413 U.S. at 611-612. It made the same finding with respect to the conduct involved in *National Dairy*, *supra*. However, as

35. *Coates v. Cincinnati*, 402 U.S. 611, 616 (1971).

we have shown, Congress never made any judgment that Article 134 should cover Avrech's conduct. [36]

Finally the government's argument that this Court should consider only the narrow question of whether particular conduct is covered by the statute would in effect nullify this Court's repeated holdings that particular statutes are invalid on their face. See, *supra*, p. 10. Under the government's theory, it would never be appropriate for this Court to consider whether a statute was constitutionally invalid on its face because the Court would never have an opportunity to reach that question. The Court would only have an opportunity to determine if particular conduct was or was not within the coverage of the statute.

*2. Article 134 Is Not Uncomstitutionally Vague.*

The government advances several contentions, not all of them consistent with each other, to support its view that Article 134 is not unconstitutionally vague. As far as we can understand, these contentions are as follows:

a. The military is a specialized society with a historical tradition and function different from that of civilian society and its need for discipline requires that standards for defining crimes be different from those for civilian society (Govt. Br. 12-18).

b. Article 134 has acquired meaning from and embodies the "well-settled customs and practices" of the military community (Govt. Br. 13-17, 24, 27).

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36. The two other cases cited by the government (Br. 22-23) lend no support to its position. In *United States v. Petrillo*, 332 U.S. 1 (1947) and *United States v. Wurzbach*, 280 U.S. 396 (1930) this Court did reach the issue of the validity of the statutes on their face and sustained them.

c. The listing of offenses in the Manual serves the pragmatic purpose of providing fair warning (Govt. Br. 28-32).

d. Article 134 is limited by the requirement that:

(i) The conduct to be punished must be "directly and palpably" prejudicial to good order and discipline (Govt. Br. 27-28);

(ii) Intent (*mens rea*) must be shown (Govt. Br. 33-34).

None of these arguments has any validity and we shall deal with them seriatim.

**a. The military is a specialized community whose need for discipline requires different standards than those applicable to civilian society.**

The government states that the military is a "specialized society" with a "history, tradition and function" different from civilian society. It suggests (Br. 17) that the military's status as a "specialized society" automatically means that, at least with respect to constitutional matters, it is governed by different standards than those of civilian society. This argument is without merit.

First, none of the cases cited by the government (Br. 12-13) have anything to do with the question of the applicability of constitutional principles to the military.[37] Further, the concept that the military is a specialized

37. Indeed, if anything, these cases support the idea that this Court will apply normal principles of civilian law in dealing with many military matters. Thus in *In re Grimley*, 137 U.S. 147 (1890) this Court applied ordinary contract principles in upholding a

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community, if ever valid, has lost much of its force in light of present day realities. As Professor Bishop stated in *Collateral Review of Courts Martial*, 61 Columbia L. Rev. 40, 70-71 (1961):

> "[T]he main reason . . . that . . . courts should draw as little distinction as possible between . . . soldiers and other citizens is simply that, if there ever was a time when the Army could rationally be described as a 'separate community' with a separate system of government, that time is long past.[38] Most male citizens of the United States (and a fair number of the female ones) have a relation to the armed forces as direct and personal as that of a citizen of Pericles Athens or the Roman Republic in the days of Cato and Censor. My objection to the 'separate community' idea is not simply that it does not square with the

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soldier's enlistment contract, while in *Orloff v. Willoughby*, 345 U.S. 83 (1953) it held that the Army was obligated to give a servicemen duties for which it had specifically inducted him. In *Toth v. Quarles*, 350 U.S. 11 (1955) the Court held that neither Congress nor the President had authority to provide for a trial of an ex-serviceman by court-martial. *Burns v. Wilson*, 346 U.S. 137 (1953) recognized that the military must give full and fair consideration to constitutional questions raised by servicemen.

38. In his article *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181 (1962), Chief Justice Warren pointed out that at the time of Washington's inauguration, our authorized army strength was 840, whereas our armed services now numbered over 2 million. *Id.* at 187. Obviously, in the light of so vast a change in the military establishment, it is necessary to change our concepts of the right of servicemen. Moreover, Chief Justice Warren observed that with the military affecting such a large number of persons "the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question." *Id.* at 188.

> facts. On the basis of the experience of many nations in many times, I believe that concept to be actually pernicious, as is any way of thinking which tends to make the armed services an enclave of the national policy whose inhabitants are of other caste than the rest."

The military itself has stated that it "is not a monolithic establishment separate and apart from the American stream, with concepts and practices opposed to our country's carefully built and carefully preserved traditions of justice and decency and freedom." Statement of Alfred Fitt, Under Secretary of the Army (Manpower) at the *Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary* 87th Cong. 2nd Sess. 63 (1962).

The military has to a large extent become civilianized. Vast numbers of servicemen perform technical jobs, many live off-base and commute to work. See Sherman, *Military Justice Without Military Control*, 82 Yale L.J. 1398, 1401-1403 (1973). Millions of civilians work for the military establishment and the contacts between the civilian and military communities are so numerous that "it can be said that military life is an immediate and integral part of American life." Chief Judge Quinn, United States Court of Military Appeals, *The Uniform Code of Military Justice — Its Promise and Performance*, 35 St. John's L.Rev. 225, 254 (1961).

President Nixon himself has emphasized that a soldier is a citizen first and a soldier second.[39] The concept that

39. The President's exact language was the following: "I believe that every man in uniform is a citizen first and a serviceman second and we must resist any attempt to isolate or separate the defenders from the defended." *New York Times*, June 5, 1969, p. 30:7.

soldiers remain citizens first and that an army serves to bring civilian views into the military has also been recognized both by commentators [40] and legislators [41] alike.

Even assuming that the military is to some extent a separate community, it does not follow, as the government suggests, that this community is automatically exempt from the Constitution. Indeed such a position has been rejected by military courts, *United States v. Jacoby*, 11 USCMA 428, 29 CMR 244 (1960); *United States v. Tempia*, 16 USCMA 629, 37 CMR 249 (1967) [42] and civilian courts,. see, *Kauffman v. Secretary of the Air Force*, 415 F.2d 991 (D.C. Cir. 1969), *cert. den.*, 396 U.S. 1013, *Yahr v. Resor*, 431 F.2d 690 (4th Cir. 1970), *cert. den.*, 401 U.S. 982.

Of course, as the courts said in *United States v. Jacoby*, 29 CMR at 246-247 and *Kauffman v. Secretary of the Air Force, supra* at 997, it is conceivable that in a particular case application of a particular constitutional principle to the military may be inappropriate in light of "conditions peculiar to military life." *Ibid.* But this calls for a specific analysis of the particular practice involved in

40. Marmion, *Selective Service: Conflict and Compromise*, pp. 65-69 (the fact that our soldiers are "citizens soldiers guarantees that the military will not become isolated from ordinary American society)." See Swanson, *Ministry to the Armed Forces*, p. 40; Mitrisin, *The Pros and Cons of a Voluntary Army*, Current History, August, 1968; Marmion, *The Danger of a Voluntary Army*, 42 Forensic Quarterly 489 (1968).

41. See, *e.g.*, Senator Russell, 113 Cong. Rec. 12471 (1967)

42. "The time is long since past — as, indeed the United States recognizes — when this Court will lend an attentive ear to the argument that members of the armed services are, by reason of their status, *ipso facto* deprived of all protections of the Bill of Rights." 37 CMR at 253.

light of the particular constitutional principle sought to be applied and not a blanket exemption for the military from the application of constitutional principles generally.

In the instant case the government claims that the military's need for "discipline and order" dictate different standards for the military (Govt. Br. 17) and that hence statutes, such as Article 134, should not have to meet the requirements of a criminal code (Govt. Br. 34).

The government's incantation of the phrase "discipline and order" (Govt. Br. 17) however should not — indeed cannot — serve as an automatic justification permitting the military to ignore applicable constitutional principles. This Court has on many occasions refused to accept the invocation of pat conclusionary phrases put forth to justify constitutional practices. As Chief Judge Burger stated in a related situation:

> "In recent years, the Court, in a rather casual way, has articulated the code phrase 'suspect classification' as though it embraced a reasoned constitutional concept. Admittedly, it simplifies judicial work as do 'per se' rules, but it tends to stop analysis while appearing to suggest an analytical process." *In re Griffins*, 413 U.S. 717, 730 (1973) (dissenting opinion).

*Accord*, *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973). This Court has consistently reserved for itself the task of examining code phrases such as "discipline," *Toth v. Quarles*, 350 U.S. 11, 22-23 (1955); "national defense," *United States v. Robel*, 389 U.S. 258 (1967) and "administrative convenience", *Frontiero v. Richardson*, *supra* at 690 in order to determine if there is a sufficient underlying rationale to justify the abrogation of

constitutional principles and when such underlying rationale has not withstood judicial scrutiny the statute in question has been voided. See *Toth*, *Robel*, *Frontiero*, *supra*, *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972), *cert. den.*, 409 U.S. 1076, *O'Neill v. Dent*, 364 F. Supp. 565 (E.D.N.Y. 1 73).

At no point in its brief does the government set forth the reasons why "discipline and order" and the "particular customs reflected in traditional military conduct" (Govt. Br. 17) require that the standards by which civilian statutes are judged should not be applied to the military. Servicemen are normally accorded the protections of the Constitution and indeed military spokesmen have boasted that the guarantees of military due process are in advance of those prevailing in civilian courts.[43] The government here, however, argues (Br. 34) that specificity should not be required of Article 134 "lest the standard of the Army shall come down to the requirements of a criminal code." But that is precisely what the UCMJ is. See, *e.g.*, the comments of Senator Ervin and Brig. General Hodson[44] who acknowledged that the UCMJ established the equivalent of a set of criminal laws for the military. *Joint Hearings Before the Subcomm. on Constitutional Rights of the Senate Committee on the Judiciary*, 89th Cong. 2nd Sess. 380 (1966).[45] *Cf. Giaccio v. Pennsylvania*, *supra* at 402.

43. See Sherman, *The Civilization of Military Law*, 22 Me.L. Rev. 3, 64-65 (1970).

44. At that time General Hodson was Assistant Judge Advocate General for Military Justice, Department of the Army and was speaking as the representative of the Department of Defense.

45. The UCMJ contains a whole series of penal statutes covering crimes by servicemen ranging from being absent without leave to murder. Upon conviction a serviceman may be sent to jail for periods up to life imprisonment. He may also receive a dishonorable discharge.

Moreover, as Mr. Justice Clark noted below in rejecting the government's contention that civilian standards of specificity do not apply to the military, the Court of Military Appeals in *United States v. Frantz*, 2 USMCA 161, 7 CMR 37 (1953) assumed that civilian standards of vagueness applied to the military. Similar holdings have been made by the Air Force Board of Review in *United States v. Britt*, 37 CMR 924 (AFBR 1967) and *United States v. McLeod*, 18 CMR 814 (AFBR 1954) and the Coast Guard Board of Review in *United States v. Barker*, 26 CMR 838 (CGBR 1958).

The modern military is basically an army composed of civilians. Civilians, such as appellee here, have left their normal civilian lives to serve their country for a period of at least two years and in some cases for far longer. In view of their actions and, at times their sacrifices, they certainly should be accorded the same treatment as any of their civilian counterparts who might be charged with a crime. To accord them a watered down version of constitutional guarantees, such as eliminating the guarantee that penal statutes be narrowly drawn, would demean their very act of serving in defense of their country.

The government in its brief (Br. 34) adopts with approval the argument advanced by Weiner (54 A.B.A.J. at 363) with respect to the military's need for a vague and undefined General Article:

> "[H]ow could Congress possibly legislate in minute detail what are 'disorders and neglects to the prejudice of good order and discipline,' or specify with particularity 'all conduct of a nature to bring discredit upon the armed forces'? Inevitably, new disorders and new misconduct not falling within the legislative enumeration but clearly comprehended under the existing

phraseology would occur to the ingenuity of those who are subject to military law." [46]

No doubt it may be convenient for the military to have a flexible and open-ended statute which it may use at its discretion to punish as crimes acts which are nowhere defined as such.[47] Police, mayors and indeed all enforcing authorities have traditionally argued for the same power. But the very argument is the reason why this Court has consistently declared such laws unconstitutional. Such a law "impermissibly delegates basic policy matters" to the military "for resolution on an *ad hoc* and subjective basis with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford, supra* at 108-109. It is for this reason that this Court has consistently held that new and different offenses can be punished only pursuant to a new Congressional statute. *United States v. Maze*, ___U.S.___, 42 U.S.L. Week 4113 (Jan. 8, 1974). Aside from the argument of convenience the government gives no justification why this salutary rule should not apply to the military.

Further, even the government argument of convenience[48] is contradicted by various high-ranking

46. Weiner offers no documentation for his view that servicemen are more ingenious than civilians in inventing new crimes.

47. Military men express the view that it would be far more beneficial to the general morale and discipline of the military if the servicemen felt that the system of military justice was fair and equitable. Report to General Westmoreland, Chief of Staff, by the Committee for Evaluation of the Effectiveness of the Administration of Military Justice, p. 43 (Dept. of the Army, 1971) (members of Committee were all high ranking military officials); Hodson, *supra*, 57 Mil.L.Rev. at 16.

48. "Convenience" is a far cry from "military necessity" which, according to *Kauffman v. Secretary of the Air Force,, supra*, could in certain limited circumstances justify a departure from civilian standards.

military officials, including recent Judge Advocate Generals who have expressed the view that the military can function quite well without the broad power granted by Article 134. For example, Major General Kenneth Hodson, Chief Judge of the United States Army Court of Military Review, has stated: "I would abolish Article 134 . . . . We would thus rid ourselves of 'the Devil's Article'. We don't really need it, and we can't defend our use of it in this modern world." Hodson, *supra*, 57 Mil.L.Rev. at 12. More recently the Task Force on the Administration of Military Justice in the Armed Forces [49] whose 14 members included the Judge Advocate Generals of the Air Force, Army and Navy and the Director of the Judge Advocate Division of the Marine Corps recommended that Article 134 be abolished.[50]

**b. There is a common understanding and practice as to which offenses are covered by Article 134.**

The government argues that the "generalized language" of Article 134 has gained meaning from and embodies the

49. This Task Force was commissioned by the Secretary of Defense on April 5, 1972. The various Judge Advocate Generals disagreed with portions of the Task Forces' recommendations but they made no mention of disagreeing with the recommendation regarding Article 134.

50. The 1972 Annual Report of the United States Court of Military Appeals recommended that legislation be passed which would replace Article 134 by separate punitive articles. A similar recommendation was made by the Task Force on the Administration of Military Justice. Congress in the past has responded favorably to the military's request for specific new penal articles which the military thought it needed to reach specific acts. When the UCMJ was drafted "missing movement" and "misconduct as prisoner" were made the subject of specific punitive articles. See *Hearings Before Senate Armed Services Committee on S.857 and H.R.4080*, 81st Cong. 1st Sess. 37 (1949). More recently, the making or drawing of a check without sufficient funds was enacted as a specific punitive article, Article 123a, 10 U.S.C. Section 923a.

"well-settled customs and practices" of the military (Br. 27) and that there is a "common understanding and practice" (Br. 24) as to which acts fall within the Article's coverage. However, neither the government in its brief nor the Court of Military Appeals in upholding the validity of Article 134 in *United States v. Frantz*, *supra*, states what this common understanding and practice is or where it may be found.

To support its position, the government (Br. 15-17) cites *Dynes v. Hoover*, 20 How. (61 U.S.) 65 (1858) and other old Supreme Court cases which upheld the predecessor of Article 134 on the ground that "practical men in the navy and army" knew what crimes were covered by the article.[51] But it cannot be said that there exists today any body of "practical men in the navy and army," who know the reach of Article 134. When *Dynes* was decided the military was composed of a relatively small group of professional soldiers for whom the military was a lifetime career. Such was not the case in 1969 when the appellee was tried; for at that time there were over three million men and women in military service. Moreover, as Justice Clark pointed out below, "The General Article [has] expanded beyond recognition" since *Dynes* (J.S. App. A., 21).[52]

51. *Dynes* and the other cases were all decided well before the modern contours of the void for vagueness doctrine were enunciated by this Court in the 1920's in cases such as *United States v. Cohen Grocery Co.*, *supra*, and *Connally v. General Construction Co.*, *supra*, and in a period when this Court, as noted by Justice Clark, applied a hands-off policy towards courts-martial (J.S. App. A., 24).

52. Justice Clark stated:

> "Moreover, the old authorities cited bear little weight. Not only has the General Article been expanded beyond recognition, but the greater percentage of our armed forces are today non-career personnel. They are draftees or enlisted personnel with little military experience."

As we have noted above, *supra*, p. 24 every new edition of the Manual brings forth new miscellaneous offenses and the mysterious disappearance of others. Will it be argued that these additions and deletions are the result of "common understanding?" Furthermore, as we observed above, *supra*, p. 25 the offense of disloyal statements was only added to the Manual as a new element in 1951, *after* the enactment of the Uniform Code. Is it argued that a new "common understanding and practice" arose at that time? Can it seriously be contended that the serviceman charged with bestial acts with a chicken, *United States v. Sanchez*, *supra;* drinking with an enlisted man, *United States v. Livingston*, *supra;* fornication, *United States v. Berry*, 6 USCMA 609, 20 CMR 325 (1956) and burning a building to defraud an insurance company, *United States v. Fuller*, 9 USCMA 145, 25 CMR 405 (1958), knew in advance that his acts would violate "military custom and practice?" The government admits (Br. 32) that "military custom and practice" is a fluid concept which is constantly changing. How is a serviceman to know when a particular act has solidified to the point of becoming part of military custom and practice? Even when an act has been listed in the Manual as falling within the ambit of Article 134, the highest military court has held that the act did not violate military custom. *United States v. Watuski*, 6 USCMA 724, 21 CMR 46, 53 (1956).[53]

Indeed even those charged with enforcing military laws disagree as to what constitutes a violation of military custom and practice. For example, in *United States v. Herndon*, 15 USCMA 510, 36 CMR 8 (1965), the court martial members held that obtaining telephone services with intent to defraud amounted to a violation of Article

53. The act in question was a passenger fleeing the scene of an accident. This was listed in the 1951 Manual, Appendix 6, Specification 142.

34. The Air Force Board of Review reversed. The Court f Military Appeals reversed the Board of Review holding hat such conduct did violate Article 134. The same attern occurred in *United States v. Sadinsky*, 14 USCMA 63, 34 CMR 343 (1964) (jumping off a ship). On the ther hand there have been cases in which the Court of Iilitary Appeals has held that an act did not violate rticle 134 even though the lower military court had held therwise. See, *e.g.*, *United States v. Downard*, 6 USCMA 38, 20 CMR 254 (1955) (negligent failure to maintain ufficient bank funds); *United States v. Gillin*, 8 USCMA 69, 25 CMR 173 (1958) (unlawful entry of a car); *United tates v. Sinigar*, 6 USCMA 330, 20 CMR 46 (1955) efusal to testify at a coroner's inquest). Even the various ervices disagree among themselves at times as to what acts olate Article 134. See *Joint Hearings*, *supra* at 365.[54]

It is abundantly clear that there is no "common nderstanding and practice" as to what acts fall within the cope of Article 134. The "well-settled custom and ractice" of Article 134 is that it serves as a catch-all to over any acts that a local commanding officer, in his bsolute discretion, feels violates the broad and generalized nguage of the article.

**c. The Manual provides fair warning.**

The government argues (Br. 30-32) that Article 134 is ot vague because the listing of specific offenses in the

54. The act in question amounted to frequent involvement with ivilian authorities in the nature of receiving numerous traffic iolations. The Judge Advocate General of the Navy stated that any years earlier he had charged a serviceman with violating Article 34 for this activity. General Hodson for the Army and Major eneral Manss for the Air Force stated that such activity did not mount to a violation of Article 134.

Manual, as a practical matter, gives "adequate notice" to servicemen. This argument has no merit.

In the first place the listing of specific offenses in the Manual does not create or define offenses but is only a "procedural guide." *United States v. Waluski*, 21 CMR at 46. The military courts have consistently held on the one hand, that the listing of an act in the Manual does not necessarily bring it within the coverage of Article 134, see, *e..g., United States v. Caune*, 22 USCMA 200, 46 CMR 200 (1973); *United States v. Gillin, supra; United States v. Waluski, supra; United States v. Hill*, ___ USCMA ___, CMR___, No. 27096 (Court of Military Appeals, Dec. 14, 1973) and on the other hand, that the omission of an act from the Manual's list does not exclude it from the coverage of the Article, see *supra* p. 23. As Justice Clark noted below, the cases "demonstrate it is neither necessary nor sufficient that a serviceman's conduct fit a Manual specification in order for him to incur criminal liability under Article 134" (J.S. App. A., 22-23).

In short what does or does not constitute a crime is only determined on an *ad hoc* basis *after* the event. Reference to the Manual's listing of specifications provides no guidance for, as the court below observed, "the Manual is but a mini-digest of the roving character of Article 134, whose vague and indefinite language is absolutely controlling." (J.S. App. A., 23).

Secondly, implicit in the government contention that the Manual provides fair warning is the premise that the President has the power to prescribe substantive offenses. The government takes no position as to whether the President has such power and states only that this question is "unsettled." But if his power is unsettled then obviously servicemen cannot and should not be

red to rely upon the Manual as a guide to what is or is prohibited. Moreover, it is plain that the question is "unsettled." The United States Court of Military als has flatly held that Congress did not and could mpower the President to define substantive offenses[55] as struck down substantive rules of law appearing in Manual. *United States v. Acosta-Vargas*, 13 USCMA 32 CMR 388 (1962); *United States v. Smith*, 13 MA 105, 32 CMR 105 (1962).

he government further suggests (Br. 30, fn. 14) ugh it does not argue, that the President as nander-in-Chief may have "inherent power to ulgate military law."[56] Yet the President's power as nander-in-Chief was not intended to include the

. In addition to the cases cited by the government (Br. 30, fn. r this proposition, see *United States v. Barnes*, 14 USCMA 4 CMR 347 (1964). In *Barnes*, the government conceded that esident lacked the power to create substantive offenses (Govt. Court of Military Appeals, 8-9), and the court agreed, stating Presidential authority in the premises is limited to the lgation of rules of procedure and modes of proof rather than passing matters of substantive law." 34 CMR at 349. In *Levy or*, 17 USCMA 135, 37 CMR 399, 403 (1967) the court ized Article 36 of the UCMJ, 10 U.S.C. Section 836 (pursuant ch the President derives his authority to issue the Manual) to ess' grant of authority "to the Supreme Court to prescribe f practice and procedure in Federal civilian cases." Article 56, S.C. Section 856, the other article cited by the government, ives the President power to establish limits of punishment for martial offenses and no one has heretofore seriously suggested gives the President power to create crimes.

. The government cites *Swaim v. United States*, 165 U.S. 553 ), for this proposition. Yet *Swaim* merely involved Presidential to convene a court-martial and not his power to create crimes. overnment also cites language from *Reid v. Covert*, 354 U.S. 1, 956). This language was followed by the Court's comment

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power to define crimes for the military, *The Federalist*, No. LXIX (Hamilton); Story, *Commentaries on the Constitution*, Vol. 2, p. 108 (4th ed. 1873); *United States v. McCormick*, 12 USCMA 26, 30 CMR 26, 28 (1960); *Ex Parte Milligan*, 71 U.S. (4 Wall) 2 (1866) for this power was explicitly granted by Article 1, Section 8, Clause 14 of the Constitution to Congress. [57]

Finally the government suggests that irrespective of Presidential power or the status of the Manual as substantive law its existence provides fair warning to servicemen of the coverage of Article 134. Aside from the fact that, as we have shown, this argument is not factually true, see *supra*, pp. 23-24 the logic of the government's position is that any commanding officer from the President down can define the contours of Article 134 by posting in an area to which servicemen have access a list of those offenses which the commanding officer feels are covered by Article 134. Such a procedure may be pragmatic for the military but there is no constitutional basis for claiming that an undefined and vague statute provides a license for enforcing authorities to determine its

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> "If the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers." 354 U.S. at 39.

57. This Court should not be blind to the reality that the listing of offenses in the Manual is not done by the President himself but by military officials.

coverage. Indeed leaving "basic policy matters" to enforcing authorities "for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application", *Grayned v. City of Rockland*, *supra* at 109, is one of the evils this Court has sought to avoid by requiring that penal statutes clearly set forth the conduct it proscribes.

This Court has uniformly held that if a statute is vague it cannot be saved by the practical device of allowing officials other than legislative bodies unfettered discretion to determine its scope. Nearly 100 years ago this Court stated in *United States v. Reese*, 92 U.S. 214, 221 (1876):

> "It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could rightfully be detained and who should be set at large."

This same principle was reaffirmed nearly a century later in *Giaccio v. Pennsylvania*, *supra*, at 402-3, where this Court stated that a statute is not valid if it leaves "judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Accord*, *United States v. Five Gambling Devices*, 346 U.S. 441, 453 (1953) (Justices Black and Douglas concurring); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940); *Musser v. Utah*, 333 U.S. 95, 97 (1948); *Baggett v. Bullitt*, 377 U.S. 360, 373 (1964), *United States v. Robel*, *supra* at 275-276.

The government's citation (Br. 31) of *United States Civil Service Commission v. National Association of Letter Carriers*, *supra*, is not on point. In the first place the statute there involved was a regulatory, not a penal, statute. Moreover, the Court in that case did not sanction

any broad delegation of power to set basic legislative policy as the government would contend for here. The Court merely held that a particular phrase in the statute ("active part in political management") was not vague and "open-ended" since the phrase had been explicitly defined by Congress to mean the rules which had been developed by the Civil Service Commission prior to passage of the Act.[58] Furthermore this Court emphasized that it was sustaining the validity of the statute not because it granted broad power to the Civil Service Commission but rather because

> "It appears plainly enough that Congress intended to deprive the Civil Service Commission of rule making power in the sense of exercising a subordinate legislative role in fashioning a more expansive definition of the kind of conduct that would violate the prohibition against taking an active part in political management or political campaigns." *Id.* at 571.

The opinion of the Court indicates that both Congress and this Court considered that any grant of broad rule making authority to the Commission would have been invalid. *Id.* at 570.[59]

58. This Court noted that the Commission had "fleshed out" the meaning of the phrase to such an extent that a "clear and summary" statement of activities falling within the phrase had been prepared. 413 U.S. at 572. Such a statement could obviously not be drawn up with respect to Article 134.

59. The Court noted that the Act as originally drafted had conferred "broad rule making authority" on the Commission to spell out the meaning of the phrase in question and that Congress in discussing this particular section had expressed "strong objections" to this as "being an unwise and invalid delegation of legislative power to the Commission." *Id.* at 570. Consequently Congress itself wrote the definition of the phrase into the statute.

The government finally suggests (Br. 31) that this case, ike *Letter Carriers* is simply an example of "filling in the letails" of a legislative prohibition. We think it is preposterous to compare the Civil Service Commission's mplementation of the phrase "active part in political nanagement" with the conglomerate miscellaneous offenses in the Manual. Even more incredible is the government argument (Br. 32) that it is "immaterial that n the Hatch Act the statute specifically referred to the Commission's interpretations, whereas Article 134 is silent vith respect to the Manual." On the contrary, this Court n *Letter Carriers* expressly upheld the Act because the Commission's interpretations had been specifically adopted and approved by Congress. Indeed if the military vished to follow the example of the *Letter Carriers* case it vould submit for Congress' ratification and approval the ist of offenses in the Manual. But as a collorary to such ction the military would have to forego the authority it ow claims to add and delete, at random, from this list of offenses.

**d. Article 134 is limited by the requirements that (i) "direct and palpable" injury be shown and (ii) convictions require a showing of *mens rea*.**

(i). Initially, we note that the government's argument (Br. 27-28) that the reach of Article 134 is limited by a requirement that the offense in question cause "direct and palpable" injury totally ignores the second clause of Article 134. The government's quotations (Br. 28) from *United States v. Sadinsky*, *supra*, *United States v. Holiday*, 4 USCMA 454, 16 CMR 28 (1954) and the Manual, Par. 213b, involve discussions of the first clause of Article 134. The second clause of the Article ("all conduct of a nature to bring discredit upon the armed forces") by its very terms allows for conviction without any requirement of

"direct and palpable" and the Manual makes this clear when it states that this clause makes punishable conduct "which has a *tendency* to bring the service into disrepute." Manual, Par. 213c (emphasis added).[60]

Even if limited to the first clause, the government's argument is without merit. First nowhere are any standards set forth defining the meaning of "direct and palpable." The government does not offer any suggestion as to the meaning of these terms nor has the Court of Military Appeals ever done so. Second, the military itself has recognized that "it is not always easy to tell what acts fits in this category [of "direct and palpable"]"[61] *United States v. Davis*, 27 CMR 908, 909 (CGBR 1968) and at times the highest military court has held that certain acts were *per se* prejudicial to good order and discipline. *United States v. Snyder*, 1 USCMA 423, 4 CMR 15, 19 (1952), *United States v. Clark*, 22 CMR 888, 890 (AFBR 1956), *pet. den.*, 22 CMR 331 (1956).

More significantly, the Court of Military Appeals has recently held that the requirement of "direct and palpable" injury does not apply where the serviceman is charged with making disloyal statements. *United States v. Gray*, 20 USCMA 63, 42 CMR 255 (1970),[62] *United*

60. The government consistently and blithely ignores what we have noted before, namely, that the invalidity of either clause would void Avrech's conviction.

61. An examination of the cases shows that the term "direct and palpable" has no precise meaning and is not useful in resolving the vagueness of the Article. See, *e.g.*, *United States v. Clark*, 22 CMR 888 (AFBR 1956), *United States v. Wilson*, 13 USCMA 670, 33 CMR 202 (1963), *United States v. Mardis*, 6 USCMA 624, 20 CMR 340 (1956), *United States v. Walters*, 11 CMR 355 (ABR 1953), *aff'd in part on other grounds*, 4 USCMA 617, 16 CMR 191 (1954), *United States v. Hill*, *supra*.

62. The court stated that as long as the evidence did not "foreclose all possibility of successful promotion of disloyalty and

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*States v. Priest*, 21 USCMA 564, 45 CMR 338 (1972).[63] This elimination of the requirement of good order and discipline as applied to the offense of disloyal statements was noted by the court in *Stolte v. Laird*, 353 F. Supp. 1392, 1397 (D.C. D.C. 1972) which stated that the military had adopted a "*per se* approach justifying a finding of prejudice to good order upon a finding that a statement was disloyal."

Moreover, it is obvious that any fair application of this good order and discipline test would have required an acquittal here, for Avrech was convicted of an *attempt* to publish and it is plain that this attempt did not amount to a "direct and palpable" injury given the fact that his statement was not seen by anyone other than the person who brought his conduct to the attention of the authorities. Significantly, the government nowhere argues that Avrech's conduct here amounted to a "direct and palpable" prejudice to good order and discipline.

(ii). The government's related argument (Br. 33–34) that the requirement of *mens rea* limits the scope of Article 134 is likewise without merit. As the government concedes (Br. 33), no such requirement is contained in Article 134 and many of the specifications set out in the Manual do not require *mens rea*. The Court of Military Appeals stated in *United States v. Taylor*, 17 USCMA 595, 38 CMR 393, 395 (1968) that "Article 134, however, has an objective orientation in that it is calculated to preserve good order and discipline, without necessarily considering

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disaffection" it would support a finding of "reasonable direct prejudice to good order and discipline." 42 CMR at 260.

63. The court found the accused's conduct "sharply conflicts with conventional concepts of good order and discipline" and that the court members were justified in finding that "their [the statements] publication and distribution *tended* palpably and directly to *affect* military order and discipline." (Emphasis added.) 45 CMR at 338.

the particular mental attitude of the accused in committing a disruptive act." 38 CMR at 395.[64]

Moreover, as pointed out by the court in *Stolte v. Laird, supra*, in disloyalty cases the element of intent is not an independent element of the offense.

> "Most statements are intended to promote some thoughts on the part of the listener, and such design or intent is implicit in most forms of human communication. If the communication itself is deemed to be disloyal, it easily follows that it was intended to promote disloyal thoughts among the listeners. Thus the finding of the requisite intent can be, and has been [citing *United States v. Gray*] established simply by virtue of the fact that the statement found to be disloyal was communicated to other military personnel. The intent element of the specification is thus deprived of any independent vitality and made to turn upon the finding of whether the initial statement was disloyal." 393 F.Supp. at 1405.

Neither *United States v. Guest*, 383 U.S. 745 (1966) nor *Screws v. United States*, 325 U.S. 91 (1945) cited by the government (Br. 34) hold, as the government states, that a "scienter requirement can save a criminal statute from unconstitutional vagueness." They hold only that one who has specific intent can not complain that he was not given fair warning that the offense he committed was prohibited by the statute. However, as noted by this Court in *Grayned v. City of Rockford, supra*, the doctrine of vagueness does not rest solely on the need for a statute to give "fair warning."[65] Both *Guest* and *Screws* explicitly

64. The same principle (that *mens rea* was not a prerequisite to a conviction under Article 134) was applied in *United States v. Williams, supra*, where a serviceman was convicted under Article 134 of a lesser included offense precisely because he was too drunk to have the *mens rea* necessary to convict him of the original larceny charge under Article 121.

65. Throughout its brief the government consistently adopts the erroneous position that the *only* vice of a vague statute is a failure to give "fair warning."

recognize that although *scienter* may under certain circumstances eliminate the objection of lack of fair warning it cannot save a statute from the other defects of vagueness, *i.e.*, unlimited discretion to enforcing authorities and overbreath. For this reason, in both cases the Court sustained the statutes only because it was able to find that neither of these other values were violated by the statutes since the rights protected by the statutes had been "firmly and precisely established by a consistent line of decisions." *United States v. Guest*, 383 U.S. at 754; *Screws v. United States*, 325 U.S. at 104. That this was the limited holding in those cases was made clear by the statement in *Screws* that "willful conduct cannot make definite that which is undefined. But willful violators of constitutional requirements *which have been defined* certainly are in no position to say that they had no adequate advance notice that they would be visited with punishment." *Id.* at 105. (Emphasis added.)

The present statute, unlike those in *Guest* and *Screws* has not been made specific and definite. It is difficult to conceive of a statute which is broader in scope and more susceptible of arbitrary enforcement than Article 134. It allows the exercise of rights to depend upon the "unfettered discretion" *Papachristou v. City of Jacksonville*, *supra* at 159, and "uncontrolled will of an official" *Staub v. City of Baxley*, *supra* at 322. No one can possibly define the meaning of the Article and the outer limits of its broad scope have yet to be reached.

## POINT II

## ARTICLE 134 OF THE UNIFORM CODE OF MILITARY JUSTICE IS UNCONSTITUTIONALLY OVERBROAD.

The government concedes (Br. 12, 18-19) that its contention that this Court should not consider the validity

of a statute on its face has no application to a statute whose prohibition "directly impinge upon or significantly implicate First Amendment rights." (Br. 12). The government also concedes that Article 134 does impinge upon First Amendment rights (Br. 23, 25). This Court has consistently held that a statute should be declared invalid on its face if within its reach "it prohibits constitutionally protected conduct." *Grayned v. City of Rockford*, *supra* at 114; *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1963), and where First Amendment rights are involved statutes are invalid unless they are drawn with "narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). Judged by these standards Article 134 is clearly overbroad for, as our previous discussion has shown, this Article has no definite contours and can cover any conduct offensive to the military, including protected First Amendment activities.[66]

The government argues that the doctrine of overbreadth should not be applied to Article 134 because "in most of its applications Article 134 does not deal with speech-related activities but with conduct that implicates no First Amendment interests" (Govt. Br. 35). But the fact that Article 134 embraces within its scope every conceivable act that may conceivably affect good order and discipline or bring discredit upon the armed forces, including non First Amendment activities, does not diminish its chilling effect on the exercise of First Amendment rights. Accordingly its argument cannot be squared with the rationale underlying this Court's decisions holding statutes invalid for overbreath because of their impingement on First Amendment activities.

The government's claim that facial invalidity has been *principally* applied to statutes regulating "only spoken

66. For a discussion of the application of Article 134 to the First Amendment area, see Moyer, *Justice and The Military*, Section 4:145—Section 4:150 (1972).

words," recognizes that this doctrine has also been applied to statutes which regulate conduct as well. See, *e.g.*, *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Dombrowki v. Pfister*, *supra*; *Coates v. Cincinnati*, *supra*. Nor is there any merit to the government's further point that in considering the Article's overbreath one must be confined to the specifications in the Manual for as we have already shown, Article 134 is not so limited.

In effect, the government's argument concedes the following: (1) that Article 134 covers First Amendment activities; (2) that a statute which reaches First Amendment activities is over-broad; and (3) that the validity of such statutes are to be determined on their face. Thus, Article 134 must be declared invalid on the grounds of over-breadth. [67]

## POINT III

## THE WORD "DISLOYAL" USED IN THE COURT-MARTIAL CHARGE IS VAGUE AND OVERBROAD.

We have set out above, *supra*, pp. 10-11 the standards to be applied in determining whether words in a penal statute are vague and overbroad. In the instant case, Avrech was charged under Article 134 with making a "disloyal" statement with design to promote "disloyalty and disaffection." It is plain that tested by the relevant standards the word "disloyal" is both vague and overbroad. [68] As this Court stated in *Baggett v. Bullitt*,

67. As we show more fully in Point III, the government's contention that the particular specification of "disloyal statement" is not overbroad also has no validity.

68. Even if Article 134 can be saved from attack on vagueness and overbreadth grounds, the judgement below must be affirmed if the specification here fails to meet constitutional standards.

*supra* at 380, "measures which purport to define disloyalty must allow public servants to know what is and is not disloyal."

Disloyalty is not defined in either the Uniform Code of Military Justice or in any military regulations. Indeed, we know of no definition of this word in any United States statute. Congress never enacted the "uttering of disloyal statements" (Manual, Specification 147) as an offense and all that is known is that some anonymous military official added it as a "new entry" in the 1951 Manual for Courts-Martial, see *supra*, p. 25. Hence there is no evidence of any legislative intent that can serve to give meaning to this word.

One lower federal court which dealt with this precise issue held that the word "disloyal," as used in charges brought under Article 134, was unconstitutionally vague. In *Stolte v. Laird*, *supra*, the court overturned the disloyalty convictions of two servicemen who had distributed leaflets expressing their disapproval of the war in Vietnam. After reviewing this Court's standards of vagueness, the court held that:

> "[T]he word 'disloyal' is inherently ambiguous and ill-suited to prescriptive use, especially where First Amendment rights are involved. It is not a word of easily defined meaning and common understanding such that no further standard is necessary . . . .Just as 'conduct that annoys some people does not annoy others' [*Coates v. City of Cincinnati*, 402 U.S. 611] so also that which is disloyalty to some may seem to others the highest form of patriotism. . . .This Court is unable to perceive any 'ascertainable standard or guideline superimposed on the regulation in the context of the military environment' [*Schneider v. Laird*, 451 F.2d 345 (10th Cir. 1972, *cert. den.*, 407 U.S.

> 914] and has been offered no authorities, indeed nothing at all, from which even the outlines of such an 'ascertainable standard might be drawn.'" *Id.* at 1398-1399.[69]

Similarly in *Carlson v. Schlesinger*, 364 F.Supp. 626 (D.C. D.C. 1973), the court held that an Air Force regulation containing the words "loyalty, discipline [and] morale" was unconstitutionally vague since it provided no standards to guide commanding officers in deciding what publications came within its terms.

The government frankly concedes (Br. 36) that the term "disloyalty" only sets forth "general standards," arguing that no more can be done when dealing with so "subtle and sensitive" a subject.

We can well understand the government's difficulty in defining disloyalty for we venture to suggest that it is a vague concept which is not easily susceptible of definition. Various writers have recognized that the word is inherently vague and indefinite. See *e.g.*, Emerson and Helfeld, *Loyalty Among Government Employees*, 58 Yale L.J. 1, 38-53 (1948); Commager, *Freedom, Loyalty and Dissent*, Ch. 5 (1954); Bantecou, *The Federal Loyalty Security Program*, pp. 242-243 (1953); Gellhorn, *Security, Loyalty and Science*, p. 60 (1950).[70]

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69. The government never appealed this decision.

70. Occasionally writers have defined the word "disloyal" with precision, see, *e.g.*, Barth, *The Loyalty of Free Men*, p. 8 (1951) equating disloyalty with treason; Seth Richardson (then Chairman of the Loyalty Review Board) indicated that disloyalty meant advocating change in the form of government or the economic system of the United States by the use of unconstitutional means. *New York Times*, Dec. 28, 1947, p. 28, col. 6. But if the military limited itself to these precise definitions, thus eliminating the problem of vagueness, every previous prosecution for disloyalty,

The government further concedes that the application of admittedly general standards

> "to a particular statement necessarily must depend upon all the surrounding circumstances in which it was made: The precise words used, the innuendos they conveyed, the audience to which they were directed, their likely impact upon that audience, the military setting in which the statement was made, and its likely effect upon the troops" (Br. 36-37).

Obviously if the question of innocence or guilt can only be resolved after a consideration of this variety of vague factors then a serviceman certainly receives no fair warning in advance as to whether his statement constitutes disloyalty. Indeed it may well be said that under the government's approach the only standard by which it may be determined if an offense has been committed is whether or not the serviceman has been convicted or acquitted. This approach leaves the military tribunal free to make an *ad hoc* judgment in each particular case.

The government further suggests (Br. 37) that an understanding of the meaning of the term "disloyal statements" may be found in the Manual's discussion of that term. The government, however, acknowledges that the Manual makes no effort to define that term but simply lists "three representative examples . . . 'praising the enemy, attacking the war aims of the United States, or denouncing our form of government' " (Govt. Br. 37). But these examples are themselves so vague that they offer no guidance to servicemen as to what constitutes criminal activity. Moreover they are overbroad and take within their scope protected First Amendment activities.

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including the instant one, should have resulted in an acquittal. In addition, to avoid the vice of vagueness, it would be necessary to write these definitions into the UCMJ itself.

The example given by the Manual, "denouncing our orm of government" is vague and overbroad. It is similar o the oath struck down in *Baggett v. Bullitt, supra* at 371. Vould it be denouncing our "form of government" to rgue for the establishment of a unicameral legislature or o propose, as some have urged, that this Court should not ave the power to declare congressional statutes nconstitutional, or that the President should not possess he veto power. See *Schneiderman v. United States*, 320 J.S. 118, 143 (1943).

Equally vague is the Manual's example of "attacking he war aims of the United States." Application of this hrase to our recent conflict in Vietnam is impossible since he subject of our war aims in that conflict has been one of opeless confusion and continued debate since the onset f the war.

The above examples of the vagueness and possible verbroad reach of the phrases set forth in the Manual are ot just idle speculation. The vaguenesss of the pecification has allowed commanding officers to range idely over the field of speech and use the "disloyal" pecification to bring charges against servicemen whose iews are displeasing to them. For example, a serviceman as charged, *inter alia*, with disloyalty for carrying a sign eading "Let's have more than a choice between petty norant fascists in 1968" and "End Johnson's Fascist ggression in Viet Nam." *United States v. Howe*, 17 SCMA 165, 37 CMR 429 (1967). [71] Four other

71. The charge was dismissed during the court-martial since the aw officer held that the statements did not amount to disloyalty transcript of court-martial, 123-124). However, eventual dismissal f the charge does not obviate the fact that the serviceman's ommanding officer used the vague term "disloyalty" to bring harges in the first place.

servicemen were charged with promoting "disloyalty and disaffection" for having published a leaflet on base in the United States regarding a GI War Crimes Commission. *New York Times*, Jan. 25, 1970, p. 8, col. 1.

The Court of Military Appeals has recently had occasion to consider the meaning of "disloyalty." In *United States v. Harvey*, 19 USCMA 539, 42 CMR 141 (1970), the court stated that disloyalty amounted to a "disavowal of allegiance to the United States." 42 CMR at 544.[72] If the *Harvey* standard is applied to Avrech then Avrech should be acquitted because his statement did not indicate or even suggest a lack of allegiance to the United States. In any event the definition of disloyalty to mean "disavowal of allegiance" does not solve the vagueness problem for this Court held in *Baggett v. Bullitt*, *supra* at 371-372, that a similar phrase was unconstitutionally vague.

The government makes several additional arguments in an attempt to uphold the validity of the disloyalty specification. It claims that Avrech was clearly aware that his conduct amounted to a violation of Article 134. The government finds such awareness in that portion of Avrech's statement which acknowledged that the expression of his opinions might lead to a court-martial (Br. 25)[73] and from the fact that the provisions of the

72. Although the summary of the testimony at Avrech's court-martial does not indicate how the presiding officer defined "disloyalty" the then extant Military Judge's Guide, which the officer presumably followed, stated that it meant "not being faithful to an authority to whom respect, obedience or allegiance is due." Yet, such an instruction was held invalid in *United States v. Harvey*, *supra*. The Military Justice Guide was amended after the *Harvey* decision to read "not being faithful to the United States as a political entity."

73. "Do we dare express our feelings and opinions with the threat of court-martial perpetually hanging over our heads? Are your opinions worth risking a court-martial."

UCMJ are explained to all servicemen, thus making it "not unlikely" that at some point the "specific applicability of Article 134" to Avrech's conduct was discussed (Br. 26).

The Court of Appeals below rejected the government's first contention, stating:

> "The fear, if any, which Avrech had that his action might lead to this court-martial does not demonstrate that he knew his actions were covered by Article 134. Nor does it provide a substitute for the Article's vague and indefinite language. *Bouie v. City of Columbia*, 378 U.S. 347 (1964). There the Court found 'it irrelevant that petitioners at one point testified that they had intended to be arrested,' since 'the record is silent as to what petitioners intended to be arrested for....' Whether a statute affords 'fair warning . . . must be made on the basis of the statute itself and the other pertinent law, rather than on an ad hoc appraisal of the subjective expectations of particular defendants.' At 355-356, n. 5" (J.S. App. A., 23).

If anything, Avrech's apprehension that what he considered to be perfectly lawful activity (Tr.36a, 41a) might subject him to punishment evidences the overbreath of the Article and the disloyalty specification and their chilling effect on First Amendment rights.

The government's other contention with respect to Avrech's awareness, *i.e.*, that a provision in the UCMJ providing for instruction to servicemen justifies a finding that Avrech was told and knew that his conduct was covered by Article 134, is unrealistic since there is no basis for any inference that Avrech was ever instructed that his

conduct was so covered by Article 134,[74] if he was ever instructed at all.

The government argues (Br. 36) that the making of disloyal statements is a serious breach of discipline which must be punished.[75] We doubt that anyone has ever before suggested that a constitutional infirmity in a criminal statute may be ignored because an accused was guilty of a serious offense. If in fact a serious breach of discipline did occur, which we deny, this is no reason to validate an obviously invalid criminal statute such as Article 134. As the court below observed (J.S. App. A., 25, fn. 4) there are alternative statutes to cover such conduct.[76]

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74. Since the government admits that the Manual only sets out "general standards," and that disloyalty depends upon the circumstances in which a statement is made, no military official could possibly explain in advance to a serviceman what conduct is prohibited by Article 134.

75. The government points out (Br. 36) that the offense is punishable by imprisonment of up to three years, thus demonstrating its serious nature. It should be noted in contrast that the military did not take the same view of Avrech's conduct for he was only punished by loss of pay for three months and confinement for one month. The confinement portion of the sentence was suspended.

76. In addition to the statute cited by the Court below, the UCMJ itself has a wide range of statutes available to cover activities deemed to be unlawful. See, *e.g.*, Art. 82, 10 U.S.C. 882 (Soliciting desertion, mutiny, sedition or misbehavior before the enemy); Art. 89, 10 U.S.C. 889 (Disrespect toward superior commissioned officer); Art. 91, 10 U.S.C. 891 (Disrespect toward a warrant or non-commissioned officer in the execution of his office); Art. 101, 10 U.S.C. 901 (Betraying a countersign); Art. 104, 10 U.S.C. 904 (Communication or corresponding with the enemy); Art. 117, 10 U.S.C. 917 (Provoking speech or gestures).

The government's suggestion (Br. 37-38) that the ndard instructions given in a "disloyal statement" case ke clear that such a specification does not cover private versations but only statements made "in public" nich the instructions define as "openly, generally or oriously") does not help the government.[77] The cification here did not charge Avrech with "publicly" king the statement and under the definition given in the ndard instructions Avrech's statement did not amount "publicly uttering" since he intended his statement to used for private discussions with his friends.[78]

The government's final suggestion that the requirement "direct and palpable" prejudice limits the specification been answered elsewhere, *supra*, pp. 47-49.

Avrech's statement here was nothing more than a ement of disagreement with this country's policy ard Vietnam. The Court of Military Appeals in *United tes v. Harvey*, *supra*, stated that "[d]isagreement with, objection to, a policy of the Government is not essarily indicative of disloyalty to the United States." CMR at 146. Avrech's statement is milder in tone than statement of Pvt. Gray, which the Court of Military peals held not to be disloyal. *United States v. Gray*, ra (Charge IV, Specification 3).[79]

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77. We do not know what instructions were given in this case for summarized transcript of the trial does not include any ructions.

78. See, statement of facts, *supra*, p. 5. Moreover, Avrech ifically asked Corp. Jackson not to show the statement to one.

79. The government's contention (Br. 24) that Avrech was guilty disloyalty because his statement "at least implicitly urged nbers of the armed forces . . . not to participate in military vities in Vietnam" is not only an unfair inference from the

(Cont'd)

Indeed, it can well be argued that appellee demonstrated loyalty, not disloyalty, in criticizing our course of action in Vietnam. As Henry Steele Commager, one of America's most eminent historians, has written:

> "True loyalty may require, in fact, what appears to the naive to be disloyalty. It may require hostility to certain provisions of the Constitution itself, and historians have not concluded that those who subscribed to the 'Higher Law' were lacking in patriotism."[80]

Perhaps the classic definition of loyalty in the traditional American sense was stated by Mark Twain in *Connecticut Yankee in King Arthur's Court:*

> "You see my kind of loyalty was loyalty to one's country, not to its institutions or its office-holders. The country is the real thing, the substantial thing, the eternal thing; it is the thing to watch over, and care for, and be loyal to; institutions are extraneous. They are its mere clothing, and clothing can wear out, cease to protect the body from winter, disease and death . . . .
>
> The citizen who thinks he sees that the commonwealth's political clothes are worn out, and yet holds his peace and does not agitate for a new suit, is disloyal; he is a traitor. That he may be the only one who thinks he sees this decay does

(Cont'd)
statement's content but, more importantly, even if true, this contention conflicts with the Military Judge's Guide, Department of the Army Pamphlet No. 27-9, Par. 4-139 (June 1, 1971) which states that urging others to disobey orders does not constitute disloyalty.

80. Commager, *Who Is Loyal To America?*, Harper's Magazine, September, 1947, 193, 196.

not excuse him; it is his duty to agitate anyway, and it is the duty of the others to vote him down if they do not see the matter as he does" (pp. 107-108).[81]

General Douglas MacArthur echoed the same ntiments when, following his removal by President uman, he stated:

> "I find in existence a new and heretofore unknown and dangerous concept that the members of our armed forces owe primary allegiance and loyalty to those who temporarily exercise the authority of the executive branch of government, rather than to the country and its Constitution which they are sworn to defend."[82]

In short, appellee's statement may to some in the litary signify disloyalty. To millions of other citizens it nifies loyalty, loyalty to the ideals upon which this untry was founded and which to them were abandoned this country's policy in Vietnam.

## POINT IV

## APPELLEE'S STATEMENT WAS PROTECTED BY IE FIRST AMENDMENT.

Assuming that this Court decides against us on the evious issues, it must reach the additional and

81. In the same vein, Senator Carl Schurz said nearly 100 years o, "Our country, right or wrong. When right, to be kept right. hen wrong, to be put right." (Quoted in Merle Curti, *The Roots of nerican Loyalty* (1946).) See also John Schaar, *Loyalty in nerica*, p. 60 (1957).

82. Address to the Massachusetts Legislature on July 25, 1951, oted in Sherman, *The Military Courts and Servicemen's First nendment Rights*, 22 Hastings L.J. 325, 346 (1971).

fundamental question of the right of a serviceman, following his induction into the Armed Forces, to continue to exercise his First Amendment freedom to speak and to express his views on matters of paramount governmental and national concern.[83] That this issue arises in the context of the war in Vietnam is not surprising for the myriad of newspaper and magazine articles, books and speeches about the war bear testimony to the fact that in the past several years it has dominated the national headlines as has no other event in recent memory. Students, workers and professionals have all publicly expressed their views on the war. Yet the action of the military here denies to an important segment of our citizenry — indeed to that segment most directly involved in the conflict — the right to comment and to express an opinion on this subject.

In a long line of cases this Court has made abundantly clear that speech may be curtailed and punished only under very narrow circumstances. It has held that a finding of unlawful speech may be established only by adherence to the most "rigorous standard of proof", *Noto v. United States*, 367 U.S. 290, 291, (1961) and that there is a fundamental "distinction between the statement of an idea which may prompt its listeners to take unlawful action, and advocacy that such action be taken." *Dennis v. United States*, 341 U.S. 494, 545 (1951), (Mr. Justice Frankfurter concurring). See *Yates v. United States*, 354 U.S. 298, 322 (1957). The application of these principles led this Court to hold in *Bond v. Floyd*, 385 U.S. 116 (1966), that an expression of support for men who were unwilling to submit to induction "cannot be interpreted as a call to unlawful refusal to be drafted." *Id.* at 133. This Court enunciated its most recent formulation of the test for

83. The court below did not reach this issue in view of its holding that Article 134 was unconstitutionally vague. The District Court did reach the issue, holding that the appellee's statement was not protected by the First Amendment.

determining First Amendment rights in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). There this Court struck down Ohio's criminal syndicalism statute holding that the First Amendment prohibited even sanctions against speech advocating violence, except "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

The protections for speech which have been enunciated by the Supreme Court derive from the fundamental concept underlying the First Amendment, namely, that the soundest and most rational judgments will be arrived at through the free interchange of ideas, and that such interchange of ideas will enable all persons to effectively exercise their rights of self-government. See, *e.g.*, *Whitney v. California*, 274 U.S. 357 (1927); *Stromberg v. California*, *supra* at 369; *Thornhill v. Alabama*, *supra*; *Roth v. United States*, 354 U.S. 476, 484 (1957); *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964); *Garrison v. Louisiana*, 379 U.S. 64 (1964).[84]

As we have noted above, *supra*, p. 33, both civilian and military courts have made clear that the precious freedoms guaranteed by the Bill of Rights are not to be denied to citizens solely by the virtue of their induction into the

84. This concept even predated the adoption of the Constitution. Thus George Washington in an address to the Officers of the Army stated:

> "If men are to be precluded from offering their sentiments on a matter, which may involve the most serious and alarming consequences that can invite the consideration of mankind, reason is of no use to us; the freedom of speech may be taken away and dumb and silent we may be led like sheep to the slaughter." Address to the Officers of the Army, March 15, 1783, quoted in Comment, *The Serviceman's Right of Free Speech: An Analytical Approach*, 10 San Diego L.Rev. 143 (1972).

Armed Forces. The Armed Forces itself, with specific reference to freedom of speech, has recognized this principle. See Department of Defense Directive 1325.6 (Sept. 12, 1969) and Adjutant General's Memorandum "Guidance on Dissent," Dept. of the Army (May 28, 1969).

Tested by the *Brandenburg* standard, appellee's statement was clearly protected by the First Amendment. There was absolutely no evidence introduced at his court-martial that his statement was directed to inciting or producing violence. His statement did not mention, refer to or even suggest a call to illegal action. It was not intended to incite disobedience. It was not a direct personal insult to anyone, nor would any listener or reader be aroused to take unlawful action. *Cohen v. California*, 403 U.S. 15 (1971).[85]

Appellee's mild statement of opposition to governmental policy included quotations from a speech of President Nixon when he was Vice President and a statement by the Foreign Minister of Vietnam, both taken from a book entitled "Mission to Hanoi" which was readily available at the PX in Danang. There is absolutely no word in appellee's statement which has not been

85. Appellee's statement was apparently read by several servicemen, but the military at appellee's court-martial never attempted to show — indeed, it could not show — that the statement created disaffection or prompted disloyalty. Both Sgt. Moore and Corp. Slokus testified that the appellee's statement and his views on the war did not make any difference in how they carried out their military duties. (Tr. 48a, 51a). Corp. Jackson also testified that appellee "did not ask me to agree with what was on the paper. He did not say 'don't you think I am right.' He did not ask me to desert the Marine Corps. He did not ask me to join the V.C. He did not ask me to sit down on my job. He did not tell me I was foolish for being a good marine. He has never done so" (Tr. 28a).

repeated over and over again in books, periodicals and speeches and which might not have been said by any number of members of the United States Congress. It would be ignoring reality not to recognize that servicemen, including those stationed in Danang, were exposed to — indeed, themselves expressed — similar sentiments on numerous occasions.[86]

•

It is conceivable, of course, that as a result of appellee's statement, other soldiers might have re-examined their own views and perhaps even changed their own opinions. This, however, is precisely what the First Amendment was designed to protect and encourage. *Roth v. United States, supra; New York Times v. Sullivan, supra.* There is no showing that such a re-examination of views would cause any soldier to disobey orders or interfere with a military function any more than would a Vietnam serviceman's ordinary reading of books, magazines and newspapers, all of which carry similar expressions of views.

There is no reason why a serviceman should not have been allowed to express, during off-duty hours, his personal opinion on the war or on any other subject of national concern. Other citizens have been allowed to comment on matters directly affecting them, see, *e.g., Pickering v. Board of Education*, 391 U.S. 563 (1968); *James v. Board of Education*, 461 F.2d 566 *(2nd Cir. 1972), cert. den.*, 409 U.S. 1042; *Muller v. Conlisk*, 429 F.2d 901 (7th Cir. 1970); *Tepedino v. Dumpson*, 24 N.Y. 2d 705, 249 N.E.2d 751 (1969); *Brukiewa v. Police Commissioner*, 257 Md. 26, 263 A.2d 210 (1970), and have been allowed to express, in one manner or another,

86. The appellee and Sgt. Moore both testified that they discussed their opposing views on several occasions (Tr. 33a, 45a).

their opinion of the war. See *Tinker v. Des Moines School District*, 393 U.S. 503 (1969); *Schacht v. United States*, 398 U.S. 58 (1970); *Cohen v. California*, *supra*. The same should be true here, especially since servicemen were more deeply and directly affected by the war than any other class of citizens.

To train soldiers to think independently and meet the needs of today's warfare has brought about a change in the military's training of servicemen, with greater emphasis being given to a serviceman's personal freedoms. One military commentator has noted that

> "[b]ecause our military philosophy has reached the point that the soldier is to be informed of not only what he is to do but also why, the next step of allowing the soldier to freely express his views follows naturally. It is a realization that the thousands of dollars spent to train a soldier in his specialty will pay more dividends if the soldier can speak up, thereby making the soldier happier and at the same time keeping his superiors better informed." Brown, *Must The Soldier Be A Silent Member Of Our Society*, 43 Mil. L. Rev. 71, 108 (1969).[87]

In addition, allowing servicemen to express their political opinions helps to insure that the military not become isolated from the rest of American society. Such expression of opinion enables the military force to keep abreast of values and ideas current in civilian society. Finally, no showing has ever been made that soldiers who possess or express policies contrary to national policies perform less efficiently than other soldiers. As one observer of the military has noted:

87. See Johnson, *Military Discipline and Political Expression: A New Look at an Old Bugbear*, 6 Harvard Civil Rts. Civil Lib. L. Rev. 525, 534-537 (1971).

"The experience of our para-military forces, such as police and fire departments, indicates that men can be permitted a wide latitude of freedom as to their personal, political, and social beliefs and yet still perform loyally on the job. That experience also shows that men can function efficiently and bravely in jobs involving a high degree of personal danger without being subjected to rigid conformity as to beliefs and attitudes." Sherman, *The Military Courts And Servicemen's First Amendment Rights*, 22 Hast. L.J. 325, 367 (1971).

To the extent that the government deals with this issue in their brief, their response is two-fold. First, that the rights of servicemen are more restricted than those of civilians (Br. 19) and second, that appellee's statement clearly affected "good order and discipline" (Br. 25).

We do not dispute the government's contention that servicemen's rights are more limited than those of civilians. However, in determining when a serviceman may exercise such rights, one must take into consideration the fact not only that he is a serviceman, but also the place and circumstances under which he attempts to exercise these rights. This is no more than a recognition that First Amendment rights are generally subject to reasonable regulation as to the time, place and manner of exercise, and not just in the military. See *Cox v. Louisiana*, 379 U.S. 536, 554-555 (1965). Recognition of this fact does not mean that one should abandon the application of the test enunciated in *Brandenberg v. Ohio*, *supra*, or that the test for determining when First Amendment rights may be denied is any different for servicemen than for other citizens. The test is the same; the only difference is that it must be applied under different circumstances.[88]

88. For example, it would be appropriate to consider whether or not the fact that Avrech made his statement in a combat zone was a circumstance that would contribute to producing "imminent,

(Cont'd)

The government's mere statement that "good order and discipline" will be affected by appellee's statement is insufficient to justify the curtailment of appellee's rights for such a claim amounts to nothing more than "undifferentiated fear or apprehension." *Tinker v. Des Moines School District*, *supra* at 508. The government has produced absolutely no evidence to demonstrate that discussion of the Vietnam war by servicemen during their off-duty hours will interfere with discipline or cause servicemen to refuse to perform their mission.

The government's argument amounts to a view that any expression of opinion critical of national policy must be suppressed. Yet this Court has explicitly held that First Amendment rights cannot be restricted solely because of the contents sought to be expressed. *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972), *Cohen v. California*, *supra* at 18; *Schacht v. United States*, *supra* at 63. Moreover, as the court so aptly observed in *Stolte v. Laird*, *supra* at 1403-1404, the military's concept that good order and discipline will be destroyed if servicemen hear opposing views of the war

> "would support restriction of *all* dissent on war aims, even by civilians and elected officials. Yet clearly the First Amendment forbids that. To justify restrictions on military personnel that do not apply to civilians, it would be necessary to show a peculiar harm to morale and discipline especially resulting from the fact that anti-war

(Cont'd)

lawless action." As we have shown, in this particular case, Avrech's statement did not produce nor was it likely to produce such action. It should be noted in this connection that the Court of Military Appeals has frequently applied civilian standards of "probable cause" in invalidating searches in a combat zone. See *United States v. Atkins*, 22 USCMA 244, 46 CMR 244 (1973); *United States v. Troy*, 22 USCMA 195, 46 CMR 195 (1972); *United States v. Gibbons*, 21 USCMA 556, 45 CMR 330 (1972).

iews were expressed by a soldier rather than a ivilian . . . . Further, this approach presumes that ne mere hearing of anti-war sentiments will ndermine morale. It is a disservice to our military ersonnel to presume that they would be so easily wayed rather than allowing for the possibility that ney might readily reject the folly of the views xpressed and become strengthened in the view nat the military court is just . . . . Further, it must e remembered that any direct disobedience to rders, refusal of duty, or interference with ilitary operations can be properly punished under ther valid provisions of the UCMJ. It is for these easons that the Court finds it necessary to istinguish a possible effect on morale from a emonstrable effect on discipline."

government has presented no considerations which xempting the military from the application of the tandards of the First Amendment pronounced by rt. These standards are sufficiently flexible to the Court in any particular case to give tion to any valid military needs. As we have owever, no such valid military needs are present d, tested by this Court's First Amendment , Avrech's statement was fully protected by the endment.

## CONCLUSION

The decision of the court below should be affirmed for the reasons set forth in that court's opinion.

Respectfully submitted

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Dated: January 30, 1974

## APPENDIX A

Sample List of Acts With Which Servicemen Have Been Charged Since 1951 Under Article 134 Although Not Listed in the Manual As Within Article 134 At the Time They Were Committed.

ccepting money to remove Korean female from a tent, *United States v. Alexander*, 3 USCMA 346, 12 CMR 102 (1953).

ccepting money to transport female in government vehicle, *United States v. Alexander*, 3 USCMA 346, 12 CMR 102 (1953).

tering character and credit reference slip, *United States v. Wilson*, 13 USCMA 670, 33 CMR 202 (1963).

stial acts with a chicken, *United States v. Sanchez*, 11 USCMA 216, 29 CMR 32 (1960).

orrowing money from a trainee, *United States v. Calderon*, 24 CMR 338 (ABR 1957).

rning building with intent to defraud insurance company, *United States v. Fuller*, 9 USCMA 143, 25 CMR 405 (1958).

eating while calling bingo numbers, *United States v. Holt*, 7 USCMA 617, 23 CMR 81 (1957).

mmunicating defamatory statement about another person, *United States v. Brown*, 12 USCMA 368, 30 CMR 368 (1961).*

*Criminal libel was not set forth in the Manual's list of cifications until 1969.

Cruelty to member of one's own family, *United States v. Francis*, 12 CMR 695 (AFBR, 1953), *pet. den.*, 13 CMR 142 (1953).

Drinking alcoholic beverages in a public place, *United States v. Grose*, 26 CMR 740 (NBR 1958).

Endangering government property, *United States v. Martinson*, 21 USCMA 109, 44 CMR 163 (1971).

Exhibiting on shirt a representation of United States flag with a peace symbol, *United States v. Roberts*, No. 73 2070 (NCMR pending).**

Failing to remove female guest from military post, *United States v. Hibbard*, 12 CMR 492 (ABR 1953).

False statement on credit card application, *United States v. Rusterholz*, 39 CMR 903 (AFBR 1968).

Fornication, *United States v. Berry*, 6 USCMA 609, 20 CMR 325 (1956).

Fraternization with enlisted man, *United States v. Pitasi*, 20 USCMA 601, 44 CMR 31 (1971).

Jumping from a ship, *United States v. Sadinsky*, 14 USCMA 563, 34 CMR 343 (1964).

Keeping a disorderly house, *United States v. Mardis*, 6 USCMA 624, 20 CMR 340 (1956).

Laughing, talking and creating a disturbance while playing with the Marine Band on 19 May 1971, *United States v. House* (Naval District Washington).

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**At the accused's court-martial for another offense, the accused's prior record showed that he had been convicted of violating Article 134 for this offense.

Littering the lawn of public quarters, *United States v. Ledbetter*, No. 73 1536 (NCMR, 27 Sept. 1973).

Negligent failure to maintain sufficient bank funds, *United States v. Downard*, 6 USCMA 538, 20 CMR 254 (1955).

Obtaining telephone services from telephone company with intent to defraud, *United States v. Herndon*, 14 USCMA 510, 36 CMR 8 (1965).

Occupying hotel room with female who was not his wife, *United States v. Walters*, 11 CMR 355 (ABR 1953).

Officer drinking with enlisted men, *United States v. Livingston*, 8 CMR 206 (ABR 1952), *pet. den.*, 8 CMR 178 (1953).

Officer found in "compromising situation" with wife of enlisted man, *United States v. Lee*, 4 CMR 185 (ABR 1951), *pet. den.*, 4 CMR 173 (1952).

Peering through window of family dwelling, *United States v. Hill*, 38 CMR 533 (ABR 1967).

Possession of alcoholic beverages in a public place, *United States v. Grose*, 26 CMR 740 (NBR 1958).

Refusing to testify at Coroner's Inquest, *United States v. Sinigar*, 6 USCMA 330, 20 CMR 46 (1955).

Sale of commissary goods at less than authorized price, *United States v. McLeod*, 18 CMR 814 (AFBR 1954).

Showing "stag" movies, *United States v. Cowan*, 12 CMR 374 (ABR 1953).

Sleeping in another man's bed with clothes on, *Unit*
*States v. Landsperg*, No. 73 0018 (NCMR 13 Fe
1973).***

Soliciting money from trainee, *United States v. Mayre*, 3
CMR 628 (ABR 1967).

Soliciting money to represent serviceman, *United States*
*White*, 7 CMR 764 (AFBR 1953).

Window peeping into trailer, *United States v. Clark*,
CMR 888 (AFBR 1956), *pet. den.*, 22 CMR 3
(1956).

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***At the accused's court-martial for another offense,
accused's prior record showed that he had been convicted
violating Article 134 for this offense.

FILE COPY

IN THE

# Supreme Court of the United States

October Term, 1973

No. 72-1713

SECRETARY OF THE NAVY,

*Appellant,*

*v.*

MARK AVRECH,

*Appellee.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Supreme Court, U. S.
FILED
FEB 15 1974
MICHAEL RODAK, JR., CLERK

No. 73-206

JACOB J. PARKER, *et al.*,

*Appellants,*

*v.*

HOWARD B. LEVY,

*Appellee.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

# Supreme Court of the United States

October Term, 1973

No. 72-1713

SECRETARY OF THE NAVY,

*Appellant,*

*v.*

MARK AVRECH,

*Appellee.*

N APPEAL FROM THE UNITED STATES COURT
F APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

No. 73-206

JACOB J. PARKER, *et. al.*,

*Appellants,*

*v.*

HOWARD B. LEVY,

*Appellee.*

APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF *AMICUS CURIAE* ON BEHALF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

The Association of the Bar of the City of New York
s this brief pursuant to Rule 42 of the United States
preme Court. Both appellants and appellees have con-
ted to the filing of this brief, and copies of their consents
e been filed with the Clerk of this Court.

## Interest of the *Amicus Curiae*

The Association of the Bar of the City of New York ("The Association") has a membership of more than 10,200 attorneys admitted to practice in New York and elsewhere. The Association was established by Act of the New York State Legislature in 1871. Laws 1871, Chapter 819; Amended Laws 1924, Chapter 134. Its stated statutory purposes are "cultivating the science of jurisprudence, promoting reforms in the law, facilitating the administration of justice, elevating the standing of integrity, honor and courtesy in the legal profession and cherishing the spirit of brotherhood among the members thereof."

The Committee on Military Justice and Military Affairs is a Standing Committee of the Association, appointed by the President of the Association. There are at present 24 members of the Association on the Committee. The Chairman is Marvin M. Karpatkin, an active practitioner in this field, who is a General Counsel of the American Civil Liberties Union and an Adjunct Professor of Law at New York University School of Law. Other members include a law school dean, a judge of the Criminal Court of the City of New York, and the General Counsel of the NAACP. Two of the members are currently on active duty practicing criminal law in the Army Judge Advocate General's Corps; most of the members are former members of the armed services, many of them of the legal branches of those services; one is a recently retired Captain in the U.S. Coast Guard whose last assignment was Chief Legal Officer at the largest Coast Guard installation in the country, Governor's Island; and many of the members have, as military and civilian lawyers, represented servicemen and servicewomen.

Committee's Subcommittee on the Uniform Code
ry Justice was asked by the Chairman of the Com-
study the constitutionality of Article 133 (Con-
ecoming an Officer and a Gentleman) and Article
neral Article) of the Uniform Code of Military
After due consideration, an overwhelming ma-
the Subcommittee decided that Article 133 and
two clauses of Article 134 were unconstitutionally
d overbroad, and this finding was adopted by an
ming majority of the Committee at its December
eting. The Association believes that the Commit-
vs will be helpful to this Court in resolving one of
gal issues presented by the appeals at bar, and has
the Committee permission to file this brief in its

## Statutes Involved

le 133 of the Uniform Code of Military Justice
C. § 933) provides in pertinent part:

> Any commissioned officer . . . who is convicted
> conduct unbecoming an officer and a gentleman
> all be punished as a court-martial may direct.

le 134 of the Uniform Code of Military Justice
C. § 934) provides in pertinent part:*

> Though not specifically mentioned in this chap-
> r, [1] all disorders and neglects to the prejudice
> good order and discipline in the armed forces,

hird clause of Article 134 provides trial by court-martial
s and offenses not capital." This clause is used to charge
f federal law not elsewhere proscribed in the Uniform Code
Justice, and violations of state law incorporated under the
e Crimes Act, 18 U.S.C. § 13. Although this clause was
in the opinion of the Third Circuit in the *Levy* case, 478
0, we do not believe it is involved in these appeals, and we
ews as to its constitutionality. References in this brief to
4" are meant to encompass only the first two clauses.

> [and] [2] all conduct of a nature to bring discredit upon the armed forces . . . shall be taken cognizance of by general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

## Questions Presented

1. Whether Article 133 and Article 134 of the Uniform Code of Military Justice are unconstitutionally vague and overbroad.

2. In the case of a felony prosecution, should the armed services be held to the requirement of specificity imposed on civilians?

Because of the parties' individual interests and their exhaustive treatment of all of the issues involved in these appeals, we confine ourselves to discussion of the issues we consider most important as a matter of constitutional policy: the facial constitutionality of Article 133 and Article 134. We will not discuss the other issues raised or briefed by the parties.

## Statement of the Cases

*Amicus* incorporates the statement of the *Avrech* case as outlined in Appellee Avrech's brief, and the statement of the *Levy* case as outlined in the Appellant government's brief.

## Summary of Argument

A statute which either forbids or requires the performance of an act in terms which are so vague that the average reasonable man is forced to guess at its meaning, interpretation, and application, is unconstitutionally vague and overbroad, and violates due process of law.

I

Article 134 is so broad in scope that it gives no fair warning of the conduct it proscribes and fails to provide any ascertainable standard of guilt to circumscribe the discretion of the enforcing authorities.

Furthermore, although the *Manual for Courts-Martial, United States* (rev. ed. 1969), hereinafter referred to as *Manual*, (the administrative regulations governing military discipline which have been promulgated pursuant to the Uniform Code of Military Justice) does contain a number of precise specifications which can be used to charge a serviceman or servicewoman with a crime, administrative regulations cannot be used to validate an otherwise unconstitutional statute. In addition, the specifications in the *Manual* are not all encompassing; they are only examples of conduct which might be considered to come under the Article. Accordingly, the Article as applied represents a limitless catchall, without a unifying theme, for various types of vague misconduct not otherwise codified, ranging from abusing animals to wearing unauthorized insignia.

Moreover, there is no valid countervailing military justification for suspending the application of the constitutional right of fair warning to a penal statute which prescribes serious criminal penalties to offenders, as opposed to administrative sanctions. The good order and discipline necessary to accomplish the mission of the armed services can be achieved by means of a statute more clearly in accord with constitutional guidelines.

Thus, this Article is unconstitutionally vague and overbroad.

II

Article 133, which applies only to officers, suffers from the same vagueness and lack of military justification as Article 134. In addition, neither this Article nor the *Manual* explain what conduct "unbecomes" an officer or a gentleman. Moreover, the word "gentleman" is a highly subjective, amorphous term and open to abuse. It is unclear who is to decide what is or is not "gentlemanly" conduct, especially in a time of changing values and mores. There is grave doubt that the statute gives fair notice of the crimes intended to be covered.

Thus, this Article is unconstitutionally vague and overbroad.

## ARGUMENT

### POINT I

**Article 134 is unconstitutional on its face.**

We submit that the convictions of appellees for violation of Articles 133 and 134 in the instant cases must be held violative of the due process clause of the Fifth Amendment because the statute is unconstitutionally vague and overbroad.[1]

At the outset, it is important to recognize that although both of the instant cases are "free speech" cases, we do not confine our argument to that area of constitutional interpretation. Rather, unfettered by partisan interests, we urge that this Court rule in these cases on strict constitutional policy grounds. This Court has held a hard line against vague criminal statutes which offend the constitutional norm of due process. Moreover, this Court has not limited it application of the vagueness doctrine to "free speech" cases; decisions abound concerning vague statutes

1. As to the question of retroactivity, *see* note 14 *infra*.

which seek to regulate a wide range of activities, both within and without the context of the First Amendment. *Gooding* v. *Wilson*, 405 U.S. 518 (1972) (free speech); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972) (vagrancy law); *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971) (freedom of association); *United States* v. *Cardiff*, 344 U.S. 174 (1952) (FDA inspection statute); *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1938) ("gangster" label statute); *Cline* v. *Frink Dairy Co.*, 274 U.S. 445 (1927) (anti-trust profit controls); *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926) (minimum wage law); *United States* v. *Cohen Grocery Co.*, 255 U.S. 81 (1921) (price controls); and *United States* v. *Reese*, 92 U.S. 214 (1875) (statute describing violations of the Fifteenth Amendment by election officials).[2]

We suggest that the Court's holding in the cases at bar need not be restricted to a decision on First Amendment grounds. Rather, as we point out *infra*, Articles 133 and 134 do not meet constitutional standards of due process for reasons in addition to their capacity to stifle exercise of First Amendment freedoms. For that reason we meet the question of facial constitutionality of these statutes considering that their infirmity goes far beyond even the important First Amendment considerations.

**A. Article 134 is unconstitutionally vague.**

The requirement for specificity in drafting criminal statutes is a "basic principle of due process." *Grayned* v.

2. Other federal courts have also applied the vagueness concept in areas other than free speech. *See Corporation of Haverford College* v. *Reshe*r, 329 F. Supp. 1196 (E.D. Pa. 1971) (state statute denying financial aid to convicted misdemeanants). *See also United States* v. *Community TV, Inc.*, 327 F. 2d 797 (10th Cir. 1964) (excise tax laws must be applied on the basis of specific description of transaction covered, not by analogy).

*City of Rockford*, 408 U.S. 104, 108 (1972). Thus, a criminal statute must give fair warning to the citizenry of what conduct is prohibited. If the statute is drawn "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application", it will be held violative of "the first essential of due process of law." (citations omitted) *Connally* v. *General Construction Co.*, *supra*, 269 U.S. at 391. Furthermore, a criminal statute must present those who apply it with "explicit standards" for application in order to prevent "arbitrary and discriminatory enforcement of the law." *Papachristou* v. *City of Jacksonville; Grayned* v. *City of Rockford, supra.*

These principles are part of the very fibre of the due process clause of the Fifth Amendment, and have been reaffirmed by this Court most recently in *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973). *See United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548 (1973). Moreover, the standards applied by this Court in the civilian context have been held applicable as well to statutes governing the conduct of military personnel. *United States* v. *Howe*, 17 U.S.C.M.A. 165, 176-79, 37 C.M.R. 429, 440-43 (1967). *See also United States* v. *Frantz*, 2 U.S.C.M.A. 161, 7 C.M.R. 37 (1953).

Accordingly we submit that the terms of Article 134, prohibiting "all disorders and neglects to the prejudice of good order and discipline in the armed forces" and "all conduct of a nature to bring discredit upon the armed forces" do not meet the requirements of fair warning and establishment of ascertainable standards for enforcement. Thus, Article 134 is unconstitutionally vague and offends the basic principles of due process required by the Fifth Amendment.

**1. Article 134 does not give fair warning of what conduct is proscribed.**

On its face, the statute gives no notice to the serviceman from which he may determine what type of conduct is "prejudicial to good order and discipline" or service-discrediting. Appellant argues however, that this "generalized language . . . gains meaning from and embodies the well-settled customs and practices of the military community; and that those members therefore have sufficient notice of what conduct is prohibited by the Article. (Appellant's Brief in *Avrech* at 27). We submit that careful examination of the components of the "customs and practices of the military community" does not support that conclusion.

Appellant has relied specifically on the provisions of the *Manual* and the body of military and civilian case law interpreting the general article (Appellant's Brief in *Avrech* at 28). Reliance on the *Manual* to fill the void created by the vague facial language of Article 134 is unsatisfactory. First, it is doubtful whether resort may be had to such a publication for this purpose, for, as this Court has held, if a statute is vague on its face, "specification of the details of the offense[s] intended to be charged would not seem to validate it." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1938). *See also Coates* v. *City of Cincinnati, supra.* In any event, the *Manual* itself does not satisfy due process notice requirements because it is open-ended and does not contain a description of all offenses which may be punished under this Article.

The *Manual*, as a general guide, states that prosecution under the first clause of Article 134 is limited to cases in which the prejudice to good order and discipline is "reasonably direct and palpable" (paragraph 213*b*), and that, the second clause of the Article is intended to proscribe conduct which "has a tendency to bring the service into

disrepute or which tends to lower it in public esteem" (paragraph 213*c*). But these terms suffer from the same vagueness problem as the language of Article 134 itself. How is the serviceman to know what conduct constitutes a "reasonably direct and palpable" prejudice to good order and discipline? How is he to know which of his acts will have a "tendency to bring the service into disrepute?" Examination of the *Manual's* sixty-three model specifications under this Article (Appendix 6c), the discussion of fourteen of the offenses in some detail (in paragraph 213*f*), and the listing of many of those and other offenses in the Table of Maximum Punishments (paragraph 127*c*), is unsatisfactory because the list is not intended to be exclusive, but is purposely "elastic." *United States* v. *Fisher*, 6 C.M.R. 195, 199 (ABR 1952). *See also United States* v. *Holt*, 7 U.S.C.M.A. 617, 23 C.M.R. 81 (1957). Indeed, the *Manual* and Article 134 themselves restrict the punishable offenses only by noting that they must be "not specifically mentioned" in another article of the Code (*Manual*, paragraph 213*b*).

Reference to the *Manual* to give definition to Article 134 is unsatisfactory also because the *Manual* is promulgated pursuant to Executive Order and does not constitute a body of substantive law. Such a procedure would raise serious constitutional questions.[3] The United States Court

3. We agree with appellant's position that "The status of the *Manual's* specifications as substantive military law is unsettled" (Appellant's Brief in *Avrech* at 30, n. 14). *See Reid* v. *Covert*, 354 U.S. 1, 38 (1957). However, we urge this Court to reject a scheme whereby the Executive may legislate substantive criminal conduct, a task traditionally and rightly within the exclusive province of the Congress. In this regard *see* Note, *Taps for the Real Catch-22*, 81 Yale L.J. 1518, 1523-24 (1972). *See United States* v. *Eaton*, 144 U.S. 677 (1892); *Viereck* v. *United States*, 318 U.S. 236, 241 (1943); *United States* v. *George*, 228 U.S. 14 (1913); *United States* v. *Grimaud*, 220 U.S. 506 (1911); *Union Bridge Company* v. *United States*, 204 U.S. 364 (1905).

of Military Appeals itself has recognized that there is no "basis for the proposition that the President may create an offense under the Code". *United States* v. *McCormick*, 12 U.S.C.M.A. 26, 28, 30 C.M.R. 26, 29 (1960). Thus, this Court should not allow reference to the *Manual* to define offenses under the general article in the absence of legislative provision for such reference. Congress has directed only that the President establish rules of procedure and evidence and fix maximum penalties, 10 U.S.C. §§ 836 and 856 (1970). He has done this in the *Manual* under Articles 36(a) and 56 of the Uniform Code of Military Justice, respectively. Nothing in the President's statutory grant of power permits the establishment of substantive criminal offenses. In any event, as discussed *infra*, the open-ended list of Article 134 offenses in the *Manual* may give notice of what has been punished on occasion in the past, but gives no warning of what other types of conduct will be considered proscribed in the future.

Contrary to the appellant's position (Brief in *Avrech* at 31), this Court's recent decision in *Letter Carriers*, *supra*, does not resolve the problem in the instant cases. That case held that a provision of the Hatch Act, 5 U.S.C. § 7324(a)(2) was not void for vagueness, in part because it gave notice of a listing of prohibited and permitted activities contained in Civil Service Commission Regulations, 5 C.F.R. § 733. It is important to note that, unlike the *Manual*, the Civil Service Regulations do not purport to proscribe conduct which will lead to criminal prosecution. Indeed, the penalty for violation of the Hatch Act provision is removal from government service. While in itself a stringent punishment, such a sanction does not approach the deprivation of liberty and imposition of a punitive discharge which may result from a federal court-martial conviction. While in general there is no right to

employment with the federal government, the Fifth Amendment grants the right not to be tried, convicted or incarcerated without due process of law. Thus, the requirement for strict construction of penal statutes present in the instant cases was not present in *Letter Carriers*. Further, Congress specifically intended the Civil Service Commission to exercise a rule-making function for the political conduct of federal employees, although that power did not give the Commission a "subordinate legislative role in fashioning a more expansive definition of the kind of conduct that would violate [the statute]," *Id.*, 413 U.S. at 571-72. In the case of the *Manual*, however, the list of substantive Article 134 crimes adopted by the President reflects the exercise of a legislative role which exceeds his delegated powers. Indeed, the changes in the Manual in 1968 and 1969 reflect an effort at a "more expansive definition" of conduct prohibited under the general article.[4] Thus, a result in the instant cases which rejects resort to the *Manual* as an enactment of substantive Article 134 offenses would *not* conflict with the holding in *Letter Carriers*. The statutes, regulations and their purposes involve different policy considerations. We deal here with penal sanctions for criminal conduct, requiring the ultimate in specificity and strict statutory construction. *Letter Carriers* simply does not apply.

After the serviceman has been unable to determine from the *Manual* what conduct Article 134 proscribes, he is urged to examine the cases which have interpreted this Article (Appellant's Brief in *Avrech* at 28). However,

4. For example, the Article 134 crimes of obstructing justice, gambling with enlisted men, cohabitation, and burning with intent to defraud were not mentioned in the 1951 *Manual for Courts-Martial* but are included in the Table of Maximum Punishments in the *Manual* and model specifications are provided therefor.

the cases give little idea of what to expect by way of prosecution, for they interpret Article 134 to permit trial for a myriad of offenses not listed or even hinted at in the *Manual*.[5] While a reading of the cases and the *Manual*

5. There are actually seventy-six offenses listed in the Table of Maximum Punishments for Article 134. Paragraph 127, *Manual for Courts-Martial*. The following offenses not listed in the *Manual* have been held violative of either or both of the first two clauses of Article 134:

*Court of Military Appeals:* Endangering military property even though no damage inflicted, *United States* v. *Martinson*, 21 U.S.C.M.A. 109, 44 C.M.R. 163 (1971); window peeping, *United States* v. *Shoenberg*, 16 U.S.C.M.A. 425, 37 C.M.R. 45 (1966); making telephone calls without paying, an offense which the court noted "sounded" in larceny, but even if not a "crime", it was serious service-discrediting conduct, *United States* v. *Herndon*, 15 U.S.C.M.A. 510, 36 C.M.R. 8 (1965); wrongfully jumping into the sea from an aircraft carrier, *United States* v. *Sadinsky*, 14 U.S.C.M.A. 563, 34 C.M.R. 343 (1964); assaulting a specialist (as opposed to a non-commissioned officer) in the execution of his office, *United States* v. *Ragan*, 14 U.S.C.M.A. 119, 33 C.M.R. 331 (1963); embracing another man, *United States* v. *Annal*, 13 U.S.C.M.A. 427, 32 C.M.R. 427 (1963); bestial acts with a chicken, *United States* v. *Sanchez*, 11 U.S.C.M.A. 218, 29 C.M.R. 32 (1960); defiling the flag, *United States* v. *Cramer*, 8 U.S.C.M.A. 221, 24 C.M.R. 31 (1957); cheating at calling out bingo numbers, *United States* v. *Holt*, 7 U.S.C.M.A. 617, 23 C.M.R. 81 (1957); engaging in sexual intercourse in the presence of others (the couple in the next bed), *United States* v. *Berry*, 6 U.S.C.M.A. 638, 20 C.M.R. 325 (1956); accepting money to transport a Korean female in a government vehicle, *United States* v. *Alexander*, 3 U.S.C.M.A. 346, 12 C.M.R. 102 (1953); soliciting, without pay, other enlisted men to engage in sexual intercourse with a female, *United States* v. *Snyder*, 1 U.S.C.M.A. 423, 4 C.M.R. 15 (1952).

*Army Court of Military Review:* Homosexual conduct not amounting to sodomy, *United States* v. *Ortega*, 45 C.M.R. 576 (ACMR 1972); altering an official document without intent to defraud, *United States* v. *Maze*, 42 C.M.R. 376 (ACMR 1970), *rev'd on other grounds*, 20 U.S.C.M.A. 29, 44 C.M.R. 29 (1971); resisting civil apprehension, *United States* v. *Hunt*, 18 C.M.R. 498 (ABR 1954); mistreating fellow POWs, *United States* v. *Floyd*, 18 C.M.R. 362 (ABR 1954), *pet. denied*, 6 U.S.C.M.A. 817, 19 C.M.R. 413

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may give some idea what conduct was proscribed in the past, there is still no fair warning of what conduct is considered criminal today (nor was there then to those convicted in the cases listed in note 5, *supra*).

To solve the notice question of what conduct will be currently proscribed under Article 134, it has been argued that military men will know from the customs and traditions of the service what standard of conduct is expected of them in order to avoid prosecution under Article 134. In this regard, the Court of Military Appeals, citing the

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(1955); associating with a notorious prostitute, *United States* v. *Mallory*, 17 C.M.R. 409 (ABR 1954); soliciting and accepting money for showing an obscene movie, *United States* v. *Cowan*, 12 C.M.R. 375 (ABR 1953); borrowing from an enlisted man, *United States* v. *Witsell*, 12 C.M.R. 269 (ABR 1953); operating a bawdy house in government quarters, *United States* v. *Butler*, 11 C.M.R. 445 (ABR 1953); soliciting an enlisted man to go AWOL, *United States* v. *Jackson*, 8 C.M.R. 215 (ABR 1952), *pet. denied*, 2 U.S.C.M.A. 677, 8 C.M.R. 198 (1953); drinking with enlisted men, *United States* v. *Livingston*, 8 C.M.R. 206 (ABR 1952), *pet. denied*, 1 U.S.C.M.A. 676, 8 C.M.R. 178 (1953); masturbating in the presence of children, *United States* v. *Neill*, 4 C.M.R. 221 (ABR 1952), *pet. denied*, 2 U.S.C.M.A. 665, 5 C.M.R. 130 (1952); officer found in his apartment with enlisted man's wife during early morning hours, *United States* v. *Lee*, 4 C.M.R. 185 (ABR 1952), *pet. denied*, 1 U.S.C.M.A. 712, 4 C.M.R. 173 (1952).

*Air Force Court of Military Review:* Inducing others to commit masturbation, *United States* v. *Adams*, 21 C.M.R. 734 (AFBR 1956); making obscene telephone calls, *United States* v. *Harbin*, 20 C.M.R. 925 (AFBR 1955); procuring a miscarriage, *United States* v. *Woodard*, 17 C.M.R. 813 (AFBR 1954); soliciting funds to act as defense counsel in a court-martial, *United States* v. *White*, 7 C.M.R. 764 (AFBR 1953).

*Navy Court of Military Review:* Striking another person in the Navy, *United States* v. *Goldie*, 1 C.M.R. 495 (NBR 1951).

*Coast Guard:* Chief Petty Officer having a female in his quarters at midnight, *United States* v. *Cole*, 30 C.M.R. 755 (USCG Action of General Counsel as Supervisory Authority 1961).

*nual* as an example, has held that Article 134 has "ac-ired the core of a settled and understandable content of eaning." *United States* v. *Frantz, supra*, 7 C.M.R. at 39. us, that Court reasoned, because Article 134 has been ed in military law since before the American Revolu-n,[6] it must be considered "not *in vacuo*, but in the con-t in which the years have placed it." *Id.*

This argument seemingly finds support in *Dynes* v. *over*, 61 U.S. (20 How.) 65 (1858), which held that the edecessor of the general article was not void for vague-ss because the article involved (Article XXXII, Rules r Government of the Navy, enacted 23 April 1800, 2 at. 45, 49) covered crimes that had been recognized as ch "by the usages in the navy of all nations" and because hat the crimes are and how they are to be punished, is ll known to practical men in the navy and army and by se who have studied the law of courts-martial." *Id.* at . Indeed, the Court of Military Appeals has refused to consider the constitutionality of Article 134, considering elf bound by the "precedent" of *Dynes*.[7] We submit that liance upon *Dynes* as precedent for the constitutionality the present general article is completely misplaced, as monstrated by the Court below in *Levy* v. *Parker, supra*, 8 F.2d at 785-88. Put simply, times have changed. hile "practical men" in the service of their country in the neteenth century may have been aware of the conduct oscribed by the general article of 1800, the same is rdly true today. Indeed, the sheer number of new and listed offenses under current military laws demonstrates

6. The history of this Article is amply discussed by the Circuit urts below, in *Levy*, 478 F.2d at 784; in *Avrech*, 477 F.2d at 40-41.

7. *United States* v. *Unrue*, U.S.C.M.A. , 46 C.M.R. 1326 lisc. Doc. 1973).

the improbability of such awareness.[8] Furthermore, in 1858 and throughout most of the nineteenth century the standing Army and Navy of the United States numbered in the hundreds. The pay was miserable and military service attracted only the dregs of society in the lower enlisted ranks. *See* Wiener, *Courts-Martial and the Bill of Rights, The Original Practice II*, 72 Harv. L. Rev. 266, 292, 301-02 (1958). The concept of a standing Army and Navy numbering in the millions, most of them conscripts, was totally foreign to the nineteenth century American thought. Surely rules which may have been necessary and proper for regulating the armed forces 115 years ago can no longer be assumed valid today, *ipso facto*. Any society which permitted the existence of the "peculiar institution", slavery, could hardly be expected to be overly concerned about the constitutional rights of soldiers and sailors. Wiener, *supra*, at 293.

This Court has consistently rejected the argument that contemporary interpretation of the Bill of Rights is dictated be standards which existed in times past. *See e.g., Roe* v. *Wade*, 410 U.S. 113 (1973) (abortion case) and *Papachristou* v. *City of Jacksonville*, *supra* (Elizabethan poor laws cannot be used to uphold vagrancy statutes because such theories no longer fit the facts). *See also United States* v. *Walker*, 21 U.S.C.M.A. 376, 45 C.M.R. 150 (1972) (concept that as times and facts change so must the reading of the Constitution fundamental to our system of government). Compare *Scott* v. *Sanford*, 60 U.S. (19 How.) 393 (1857) with *Brown* v. *Board of Education*, 349 U.S. 294 (1954). (It is interesting to note that Justice McLean, the sole dissenter in *Dynes*, was also one of the two dissenters in the *Dred Scott* case).

8. *See* note 5, *supra*.

Finally, the scope of review by federal courts has creased greatly since *Dynes* was decided. *See Burns Wilson*, 346 U.S. 137 (1953); *Johnson* v. *Zerbst*, 304 S. 458 (1938). In *Dynes*, the Court followed the usual actice of applying strict common law rules of pleading d practice to *all* cases, civilian or military. *See Ex parte illigan*, 71 U.S. (4 Wall.) 2 (1866). Moreover, a court-arital conviction for a violation of an Article of War which nstituted a "neglect or disorder" did not subject the cused to imprisonment in a penitentiary. Articles of War, rticle 97, 18 Stat. 1342 (1874); *Carter* v. *McClaughry*, 183 S. 365, 376 (1902). Hence the primary vehicle for llateral attack of any conviction, *habeas corpus*, was not ailable for those who had been convicted of a "neglect or sorder" by courts-martial. Federal jurisdiction is no nger dependent upon these common law rules. *Dombrow-i* v. *Pfister*, 380 U.S. 479 (1965); *Kauffman* v. *Secretary the Air Force*, 415 F.2d 991 (D.C. Cir. 1969).

The only conclusion that can be drawn is that it is mpletely inappropriate to rely on a case over 115 years d in making a determination whether or not the present neral article is unconstitutionally vague and overbroad. ot only have society and the Army radically changed dur-g this time but so has the article itself and the law ap-icable to it. Indeed, the mercurial nature of the applica-on of Article 134 is the quintessence of its constitutional firmity.

One method by which Congress has attempted to hieve some modicum of notice concerning the meaning Article 134 is the provision in Article 137 that, among her provisions, the punitive articles (i.e. Articles 77 rough 134) "shall be carefully explained to each enlisted ember at the time of his entrance on active duty, or

within six days thereafter. They shall be explained again after he has completed six months of active duty, and again at the time when he reenlists." The crucial question arises as to what constitutes a "careful explanation" of Article 134. The Army, for example, devotes a total of only *twenty minutes* to an explanation of Articles 71-134 during the first six days of enlisted basic training. The re-explanation six months thereafter consists of a forty-nine minute period of instruction on these sixty-four punitive articles. The instructors need not be attorneys, nor do they seem to be provided with any regulatory guidance as to what constitutes a "careful explanation" of the statute.[9] The problem is not merely that the training time is woefully short, but more importantly that a careful explanation would require an exposition of all of the case law and *Manual* provisions interpreting Article 134. Even if such a careful explanation were possible within a reasonable period of training, it would still not satisfy constitutional notice requirements, however, because of the open-ended nature of the Article. Thus, even Article 137, the statutory notice provision, is inadequate to transform Article 134 into a statute which gives fair warning of its proscription.

Based upon this analysis we submit that Article 134 is constitutionally infirm because it is drawn "in terms so vague that men of common intelligence must necessarily guess at its meaning. . . ." *Connally* v. *General Construction Co.*, *supra*, 269 U.S. at 391.

**2. Article 134 fails to provide explicit enforcement standards.**

The general article is vague not only because it fails to provide notice, but also because "men of common intel-

9. Army Regulation 350-212, "Training: Military Justice," 2 June 1972; Army Subject Schedule 21-10, "Military Justice (Enlisted Personnel)," 24 June 1969, Courses *A* and *B*.

ligence . . . differ as to its application." *Id.* As a concomitant to lack of fair warning to servicemen in general, the Article provides insufficient guidance to those who must enforce it. The standard here is whether the statute prevents arbitrary and discriminatory enforcement by providing "explicit standards for those who apply them." *Grayned* v. *City of Rockford, supra*, 408 U.S. at 108. In the military society, the ultimate "enforcer" of the Uniform Code of Military Justice is the commanding officer, at whatever level. Initially it is the "unit commander" who usually prefers charges and conducts the primary investigation by himself or through military policemen. *Manual*, paragraphs 29*b* and 32. Furthermore, it is a commander at some level who must determine what level of judicial or nonjudicial action is to be taken. Articles 15-20 and 34(a), Uniform Code of Military Justice. Thus, the threshold question is whether Article 134, the *Manual*, or case law circumscribes adequate standards so that the commander will know when and how to apply the Article.[10] For the reasons discussed *supra* at pages 6 through 18, the answer must be that there is insufficient guidance to prevent arbitrary and discriminatory enforcement. This conclusion is supported by the many occasions on which the military appellate courts have been required to decree that commanders' attempts to punish a variety of conduct under Article 134 were beyond the bounds of the statute.[11]

10. As appellee Avrech points out (Brief at 58), the government fails to address this vital issue in its brief.

11. The following conduct has been held to be not within either of the first two clauses of Article 134:

*Court of Military Appeals:* Exposure of the genitals to a group of men in the commanding officer's office, *United States* v. *Caune*, 22 U.S.C.M.A. 200, 46 C.M.R. 200 (1973); usury, *United States* v. *Day*, 11 U.S.M.C.A. 549, 29 C.M.R. 365 (1960); negligent indecent exposure, *United States* v. *Manos*, 8 U.S.C.M.A. 734, 25 C.M.R. 238

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**The requirement for providing ascertainable enforcement standards does not stop with the need for notice to the military commander. A statute may also be unconstitutionally vague if it "leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio* v. *Pennsyl-***

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(1958); passenger in auto fleeing the scene of an accident, *United States* v. *Waluski*, 6 U.S.C.M.A. 724, 21 C.M.R. 46 (1956); negligent failure to maintain sufficient funds in a checking account, *United States* v. *Downard*, 6 U.S.C.M.A. 528, 20 C.M.R. 254 (1956); wrongfully refusing to testify before a Canadian coroner's inquest, *United States* v. *Siniger*, 6 U.S.C.M.A. 330, 20 C.M.R. 46 (1956); misappropriation of a government vehicle, *United States* v. *Norris*, 2 U.S.C.M.A. 236, 8 C.M.R. 36 (1953).

*Army Court of Military Review:* Introduction of obscene pictures onto a federal reservation for personal use, *United States* v. *Schneider*, 27 C.M.R. 566 (ABR 1958); simple trespass, *United States* v. *Will*, 25 C.M.R. 674 (ABR 1958); occupying a hotel room with a female, *United States* v. *Walter*, 11 C.M.R. 355 (ABR 1953), *rev'd on other grounds*, 4 U.S.C.M.A. 617, 16 C.M.R. 191 (1954); possession of another's ration card, *United States* v. *Johnson*, 5 C.M.R. 268 (ABR 1952).

*Air Force Court of Military Review:* Sniffing glue, where no intoxication is alleged, *United States* v. *Menta*, 39 C.M.R. 956 (AFBR 1968); burning one's own home, *United States* v. *Freeman*, 15 C.M.R. 639 (AFBR 1954), *pet. denied*, 4 U.S.C.M.A. 734, 16 C.M.R. 292 (1954); wrongfully being in a WAF dayroom (accused male) at 3 A.M., *United States* v. *Smart*, 12 C.M.R. 825 (AFBR 1953); ejecting a member of one's household in the early morning hours where no duty to support is alleged, *United States* v. *Francis*, 12 C.M.R. 695 (AFBR 1953), *pet. denied*, 3 U.S.C.M.A. 837, 13 C.M.R. 142 (1953); having introduced a German female onto a military post, failing to remove her, *United States* v. *Habbard*, 12 C.M.R. 492 (AFBR 1953); violation of foreign law, *United States* v. *Wolverton*, 10 C.M.R. 641 (AFBR 1953).

*Coast Guard Court of Military Review:* Removal of fuses from a fuse box, *United States* v. *Davis*, 27 C.M.R. 908 (CGBR 1958); possession of U.S. currency in the Philippines, *United States* v. *Rio Poon*, 26 C.M.R. 830 (CGBR 1958); possession of narcotics paraphernalia, *United States* v. *LeFort*, 15 C.M.R. 596 (CGBR 1954).

*vania*, 382 U.S. 399, 402-03 (1966). *See also Grayned* v. *City of Rockford*, *supra*. In trials by court-martial, the military jury must be instructed upon all of the elements of the offenses charged, including, in an Article 134 prosecution, whether the conduct charged is prejudicial to good order and discipline or service-discrediting. *Manual*, paragraphs 73*a*, 213*d*. By way of further definition, the instruction will invariably include the admonition that Article 134 does not contemplate "distant effects" but is limited to cases where the prejudice is "reasonably direct and palpable", and that conduct which is service-discrediting is that which "has a tendency to bring the service into disrepute or which tends to lower it in public esteem." Paragraphs 4-126, Department of the Army Pamphlet 27-9, "Military Judges' Guide", (1969). This "definition" suffers from the same vagueness as the statute and the *Manual*. Moreover, it requires a wholly subjective decision by military judges and court-martial members, each of whom will have his own concept of what type of conduct (if not every type), should be proscribed.

Appellants seem to suggest that the standard instructions assure that the prohibitions of Article 134 are concretized and thus prevent overbroad application. *See* Appellant's Brief in *Avrech* at 38. *See also* discussion, *infra*, at 23-24. To the contrary, these instructions illustrate the imprecision with which the statute may be applied at the whim of the commander, the military judge and the military jury. Even ascribing total good faith to all concerned, there is more than a fair risk that the prosecution for a given type of conduct will fall without the ambit of the statute. The military cases in this area[12] reflect the very real probability that those who enforce them will do so against conduct which

12. *See* note 11, *supra*.

is not illegal, due to the absence of sufficient standards or guidelines. *Gooding* v. *Wilson*, *Papachristou* v. *City of Jacksonville*, and *United States* v. *Reese*, *supra*.

It is insufficient to argue that appellate courts may eventually vindicate service members convicted improperly under Article 134; no one should be subjected to prosecution for conduct which is not illegal. Due process requires that the accused must be afforded adequate notice by the statute under which he is charged, not merely through its eventual interpretation years later by an appellate court. Article 134 does not provide that protection for the military accused, either at the time he is charged or at the time he is tried. Indeed, by submitting the question to the court members on decidedly vague instructions, the military practice gives fact-finders the unprecedented opportunity to make law through their findings of guilty. If executive legislation is prohibited, *United States* v. *McCormick*, *supra*, surely this Court will not sanction the establishment of a military common law of substantive crimes arrived at on an *ad hoc* basis by diverse court-martial juries.

Just as the soldier or sailor cannot reasonably determine what conduct is proscribed by Article 134, so the commander, military judge and court members are in the dark. The danger is that the latter group are charged with enforcing this statute to regulate the conduct of the former. This Court has never permitted the blind thus to lead the blind through the maze created by a vague penal statute. The strong constitutional policy against vagueness of this sort dictates a holding that Article 134 does not comport with the due process requirements of the Fifth Amendment because it does not give fair warning to the accused or his accuser. *Gooding* v. *Wilson*, *Papachristou* v. *City of Jacksonville*, *Coates* v. *City of Cincinnati*, *United States* v. *Cardiff*, and *Lanzetta* v. *New Jersey*, *supra*.

**B. Article 134 is unconstitutionally overbroad.**

Because it has the capacity for prohibiting a wide range of activities, both constitutionally protected and unprotected, Article 134 is unconstitutionally overbroad. We agree that the question of overbreadth is *usually* raised in the context of abridgement of First Amendment rights. (Appellant's Brief in *Avrech* at 35). However, the necessity for guarding against a "chilling effect" is not limited to the "free speech" area as appellant seems to urge. (*Id.* at 34-38). Thus, in *Coates* v. *City of Cincinnati, supra*, this Court reversed a conviction under a municipal ordinance which forbade "annoying conduct", because the statute *could* have encompassed both protected and unprotected conduct within the realm of freedom of assembly and association. *Id.*, 402 U.S. at 615. *See also Lanzetta* v. *New Jersey, supra.* Significantly, the Court in *Coates* did not look to the application of the statute to the conduct allegedly proscribed in that case:

> . . . It is the ordinance on its face that sets the standard of conduct and warns against transgression. The details of the offense could no more serve to validate this ordinance than could the details of an offense charged under an ordinance suspending unconditionally the right of assembly and free speech. *Id.*, at 616.

Thus, appellant's attempt to narrow the issue here to the application of Article 134 to "disloyal statements" must fail. The issue is rather whether the statute is overly broad *on its face* because it "abut[s] upon sensitive areas of basic First Amendment freedoms". *Grayned* v. *City of Rockford, supra*, 408 U.S. at 109. The inquiry is not whether a "chilling effect" has actually occurred in the case at bar, but whether the challenged statute has an unconstitutional po-

tential for such an effect when viewed on its face. *See Gooding* v. *Wilson, Coates* v. *City of Cincinnati,* and *Dombrowski* v. *Pfister, supra.*

When viewed on its face, even considering the specific listing of possible offenses in the *Manual* the conclusion is inescapable: a statute which proscribes "any conduct" prejudicial to good order and discipline or service-discrediting, is so broad in sweep that it may very well reach conduct which is protected under the First Amendment. This Court need never reach the question of whether Levy and Avrech engaged in protected activities. Their convictions must fall on the threshold ground that the statute on its face may intrude upon constitutionally protected conduct or speech. *Coates* v. *City of Cincinnati,* and *Gooding* v. *Wilson, supra.*

**C. No countervailing military necessity.**

We recognize that due to the exigencies of military service, including the need for effective discipline and combat-readiness, the serviceman may not enjoy quite as broad a First Amendment freedom as do other citizens. However, the Court of Military Appeals has held that where these circumstances exist an abridgement of First Amendment freedoms may not be justified merely on the assertion that the military is "different". Rather, the special need of the military must be clearly demonstrated. *United States v. Priest,* 21 U.S.C.M.A. 564, 570, 45 C.M.R. 338, 344 (1972).[13] This *ad hoc* approach demonstrates the over-

13. The Court of Military Appeals has made clear that servicemen are entitled to the protections set forth in the Bill of Rights, particularly the guarantees of free speech and assembly contained in the First Amendment. *United States* v. *Priest,* 21 U.S.C.M.A. 564, 45 C.M.R. 338 (1972); *United States* v. *Gray,* 20 U.S.C.M.A. 63, 42 C.M.R. 255 (1970); *United States* v. *Daniels,* 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970); *United States* v. *Howe,* 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967). *See* Quinn, *The United States Court of Military Appeals and Individual Rights in the Military Service,* 35 Notre Dame Lawyer 491 (1960).

broad sweep of Article 134, because those who contemplate certain action or speech are unable to determine whether their conduct will fall within the ambit of the statute. In this sense, the overbreadth of Article 134 is truly a symptom of its vagueness.

While the parties to these cases have well described the application of the general article to the offenses charged against Avrech and Levy, we submit that as a matter of sound policy this Court should not permit the statutes to stand due to their *facial* overbreadth. To hold otherwise would be to retreat unnecessarily from the standards of specificity and narrow drafting which this Court has required of statutes which have the potential for abutting upon the personal freedoms of the citizenry. *Gooding v. Wilson, supra; N.A.A.C.P. v. Button*, 371 U.S. 415 (1963). Even considering the obvious need for order and discipline in the military setting, the statute as presently worded is too broad to comport with constitutional due process requirements.

**D. The effect of unconstitutionality.**

Obviously, because of the number of offenses charged in the past under this Article, a ruling by this Court that Article 134 is unconstitutional will have a sweeping effect on the military justice system.[14] However, the military should be ready. The first warning came from this Court in

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14. We will not address in detail the difficult problem of retroactivity or prospectivity. However, a sensible solution to the "floodgate of litigation" problem would be that adopted in *Levy* that application of the decision is "prospective only except as to those cases where (1) the issue was raised and preserved and (2) was pending in the military judicial system or pending in the federal court system on this date [footnote omitted]." *Id.*, 478 F.2d at 796.

*O'Callahan* v. *Parker*, 395 U.S. 258, 266 (1969) when Justice Douglas asked, in *dictum*, whether the "prejudicial conduct" provision in Article 134 satisfied civilian courts' standards of vagueness. Later in *Levy* v. *Parker*, 396 U.S. 1204-05 (1969) Justice Douglas, acting on appellee Levy's application for release pending appeal, noted that the Court in *O'Callahan* had "reserved decision on whether Article 134 satisfies the standards of vagueness required by due process. Then, in a speech presented in 1972, the Chief Judge of the U.S. Army Court of Military Review, a former Judge Advocate General, Major General Kenneth J. Hodson, recommended discarding Article 134 because its use could not be defended by the military in a modern society. Moreover, he predicted that this Article could not withstand the attack now made in this Court. Hodson, *Perspective, the Manual for Courts-Martial, 1984*, 47 Mil. L. Rev. 1 (1972).

General Hodson is not alone among respected authorities suggesting the abolition of the general article. In the *Annual Report of the U.S. Court of Military Appeals and the Judge Advocates General of the Armed Forces and the General Counsel of the Department of Transportation Pursuant to the Uniform Code of Military Justice for the period January 1, 1972 to December 31, 1972*, it is acknowledged that "despite almost 200 years of constitutional history and precedent, [there is] no assurance that the Article will withstand further appellate examination. There is therefore a need for early congressional consideration of the problem." (*Id.* at 2). This sense of urgency is also reflected in the Report of the Department of Defense Task Force on the Administration of Military Justice in the Armed Forces (1972), which recommends codification of offenses currently tried under the first two clauses of Article 134 and expresses concern that the vagueness and breadth of Article 134 make it subject to abusive applica-

tion (Volume II at 79). *See also* Gaynor, *Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article*, 22 Hastings L.J. 259 (1971). *But see* Wiener, *Are the General Military Articles Unconstitutionally Vague?* 54 A.B.A.J. 357 (1968).

When the views of those who daily administer military justice are considered, it becomes clear that there is no justification for not codifying offenses now charged under Article 134 in order to provide fair warning, an ascertainable standard of enforcement, and statutes sufficiently narrow that they do not impinge upon constitutionally protected conduct or speech. We agree with the conclusion of Judge Aldisert in the *Levy* case:

> . . . [T]here exist no countervailing military considerations which justify the twisting of established standards of due process in order to hold inviolate these articles, so clearly repugnant under current constitutional values. 478 F.2d at 796.

For these reasons, Article 134 should be held unconstitutionally vague and overbroad.

## POINT II

### Article 133 is unconstitutional on its face.

Article 133 proscribes "conduct unbecoming an officer and a gentleman." We submit that on its face Article 133 suffers from the same unconstitutional vagueness and overbreadth as Article 134. Indeed, much of the discussion of the standards concerning Article 134 is pertinent here, and the arguments concerning fair warning, potential for arbitrary enforcement and overbreadth need not be repeated.

Even assuming that Congress may validly legislate against conduct which is "unbecoming", the question inherent on the face of Article 133 is what sort of conduct is unbecoming to an officer and a gentleman? Since the statutory language gives no answer we submit that *ipso facto* it fails to meet constitutional notice requirements. *See Lanzetta* v. *New Jersey, supra.* Nonetheless, appellant urges this Court to consider the content of the statute "by reference to the well-settled traditions and customs of the military." (Appellant's Brief in *Levy* at 40.) The argument runs that "to military officers, [Article 133] sufficiently specifies what conduct it prohibits to satisfy the constitutional requirement that criminal statutes not be unduly vague." *Id.* This argument apparently is designed to meet the objection that those who administer the Article, as well as those who may be ensnared by its provisions, have a special degree of knowledge which fills the void left by the statute on its face. Where, then, does this knowledge come from?

The *Manual* offers little enlightenment. If an officer turns to paragraph 212 to determine whether to charge a fellow officer under the Article (or whether to engage in certain conduct himself) he is advised that:

> . . . Not everyone is or can be expected to meet ideal moral standards, but there is a limit of tolerance below which the individual standards of an officer, cadet or midshipman cannot fall without seriously compromising his standing as an officer, cadet or midshipman or his character as a gentleman. This article contemplates conduct by a commissioned officer, cadet, or midshipman which, taking all the circumstances into consideration, is thus compromising.

If he desires further specificity about what will "compromise" either his official or personal moral standing, the officer is advised only that

> There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty or unfair dealing, indecency or indecorum, or of lawlessness, injustice or cruelty.

Finally, a catch-all sentence advises caution because ıe Article

> includes acts made punishable by any other article provided these acts amount to conduct unbecoming an officer.

'he *Manual* lists eight "instances" of violation, but obiously this list is merely illustrative, for the statute has een used to sweep many different types of conduct within s grasp.[15]

Being thus unsatisfied, the officer must then consider rior interpretations by military courts. Of course, as oted above with respect to Article 134, that inquiry will lso be unsatisfactory because the statute may be used to roscribe conduct which has not theretofore been the subect of a reported decision.

Finally, the officer is urged to consider the "customs and raditions" of the military service, perhaps by reference to ommercial publications such as *The Officer's Guide*.[16] Resort to publications of this sort, and to an amorphous ody of tradition places the officer in no better position han he was at the beginning of his inquiry: he is still nable to find a definition of what type of conduct is "unecoming" to an "officer and a gentleman"; he is still nable to find a definition of what is a "gentleman." To rge reference to the moral codes of the past is to fail to

15. *See generally*, Note, *Taps for the Real Catch-22*, note 3 *supra*, t 1526-27.

16. Reynolds, *The Officer's Guide* (1969), which has been in opyrighted publication since 1930.

appreciate the plain fact that the armed services of the 1970s are *not* the armed services of the 1870s. Even if moral standards may be the subject of Congressional control, the standards must be updated to conform to the *modes* of the times. On this regard we note a seemingly self-defeating argument by appellant in *Levy*:

> What is involved here is a system of values which has been part of the military experience for centuries. While these values are communicated to officers through military customs and usage, by example, they cannot be exhaustively codified without bringing the standard of conduct expected of officers "down to the requirements of a criminal code." (Appellant's Brief in *Levy* at 43).

That position demonstrates the very constitutional problem inherent in Article 133. It is part of a criminal code and yet purports to punish officers for failing to meet standards which somehow come to his knowledge by "example" from his predecessors through "military experience." While that approach may be satisfactory for exacting administrative penalties for improprieties (cf. *Letter Carriers, supra*), it is hardly sufficient to meet the requirements of specificity for conviction by court-martial, a federal criminal court. Contrary to appellant's position in *Levy*, the military services will not be precluded from holding officers to traditional high standards of conduct if Article 133 is struck down as vague (Brief at 43). Rather, the prohibition will be against imposing *criminal* penalties without sufficient notice of an ascertainable standard of criminal culpability. Indeed, if the traditions and customs of the service are as well-defined and relevant today as appellant claims (Brief in *Levy* at 44), the military should have little difficulty in drafting regulations or statutes which meet constitutional requirements of specificity.

As with the general article, Article 133 "leaves judges d jurors free to decide, without any legally fixed stanrd, what is prohibited and what is not in each particular se." *Giaccio* v. *Pennsylvania, supra*, 382 U.S. at 402-; *Grayned* v. *City of Rockford, supra.* Here the court embers are instructed that as an element of proof they ust determine that "under the circumstances the accused's nduct was unbecoming an officer and a gentleman." Furer, the officer jurors are advised that " 'unbecoming,' as ed in this specification refers to behavior which is not erely inappropriate or unsuitable, as being opposed to od taste or propriety or not consonant with usage, but *orally unbefitting and unworthy.*" Paragraph 4-122, epartment of the Army Pamphlet 27-9, *supra.* (Emphasis ded.) *See Manual* paragraph 212. Thus, each courtartial member is left to his own devices to determine what norally unbefitting and unworthy" conduct is. No furer standard is offered in the jury instructions, which unubtedly result in the type of *ad hoc* adjudication of guilt hich this Court has found constitutionally unacceptable. *oding* v. *Wilson*, *Papachristou* v. *City of Jacksonville*, d *Lanzetta* v. *New Jersey, supra.*

An additional vice in the use of Article 133 in criminal osecutions is that it is designed to be used as punishment r "acts made punishable by any other article, provided ese acts amount to conduct unbecoming an officer and a ntleman." *Manual* paragraph 212. For example, in the *vy* case, appellee was charged with violations of Article 3 and 134 for what was essentially the same conduct. nother example is found in paragraph 212 of the *Manual*: commissioned officer who steals property violates both is article and article 121." Is there a rational reason r this multiplication of charges? Presumably "ease of nviction" is the answer, because if the prosecution case ffers a failure of proof it might nonetheless establish

"conduct unbecoming" on facts which might not rise to the level necessary to establish commission of the substantive crime charged. However, "ease of conviction" is an unacceptable substitute for specificity in a criminal statute. *See* Note, *Taps for the Real Catch-22*, note 3 *supra*, at 1535. This potential for unreasonable multiplication of charges against an officer offends not only constitutional requirements of fairness; it seems as well to violate the provisions of Paragraph 26*b* of the *Manual* forbidding such pleading.

Finally, Article 133 suffers from the same facial overbreadth as does Article 134. Appellant's position (Brief in *Levy* at 44-47) notwithstanding, the constitutionality of the statute does not turn on whether Captain Levy's language may not have been protected speech under the circumstances. Rather, this Court's concern should be that the statute itself contains no real boundaries, and may very well cover conduct or speech which is protected by the First Amendment. *See Coates* v. *City of Cincinnati*, *supra*. Indeed, the very fact that it has been used in *Levy* as a sword against even unprotected conduct demonstrates its capability for use against speech that will ultimately be declared protected. *See United States* v. *Howe*, *supra*. The "chilling effect" here is obvious. If the military wishes to set boundaries of speech for its officers it should do so within constitutional limits to avoid encroachment into protected areas. This strict requirement in the First Amendment area is not met by the terms or application of Article 133. *Gooding* v. *Wilson*, supra.

We fully recognize the necessity for a high standard of conduct on the part of officers in our armed forces. Indeed, their example and leadership are often the means by which lives are saved in combat, and it is only through an effective officer corps that a military institution can function effectively. However, this valid policy require-

ment must be accomplished by communicating to our officers in clear statutory language what standards are expected. This is particularly so if officers are to be subjected to criminal penalties and a federal conviction for failing to comply with the standards. Thus, as a matter of sound judicial policy, Article 133 must be held violative of constitutional due process because on its face it is vague and overbroad.

## CONCLUSION

**For the foregoing reasons, the Association of the Bar of the City of New York, *Amicus Curiae*, respectfully urges this Court to affirm the judgment of the Court of Appeals in *Avrech*, and at least so much of the judgment of the Court of Appeals in *Levy* that holds Articles 133 and 134 unconstitutional.**

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Dated: New York, New York
February 1974

# In the Supreme Court of the United States

OCTOBER TERM, 1973

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No. 73-206

JACOB J. PARKER, ET AL., APPELLANTS

*v.*

HOWARD B. LEVY

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No. 72-1713

SECRETARY OF THE NAVY, APPELLANT

*v.*

MARK AVRECH

---

*ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## REPLY MEMORANDUM FOR THE APPELLANTS

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I. *Parker v. Levy, No. 73-206.*

1. The appellants in this case appealed the holding of the United States Court of Appeals for the Third Circuit that Articles 133 and 134 of the Uniform Code of Military Justice, 10 U.S.C. 933 and 934, were unconstitutional. On February 12, 1974, Levy filed a 126 page brief raising numerous procedural, evidentiary and constitutional issues which fail outside the issue pre-

sented in the appeal. While the issues raised by Levy may, in fact, constitute alternative arguments for the affirmance of the judgment below, they were never passed upon by the court of appeals.

We respectfully suggest that if this Court finds Articles 133 and 134 to be constitutional, the case should be remanded to the court of appeals for consideration of the alternative arguments raised by Levy. This procedure has been explained by the Court in *United States* v. *Ballard,* 322 U.S. 78, 88, as follows:

> Respondents maintain that the reversal of the judgment of conviction was justified on other distinct grounds. The Circuit Court of Appeals did not reach those questions. Respondents may, of course, urge them here in support of the judgment of the Circuit Court of Appeals. *Langnes* v. *Green,* 282 U.S. 531, 538—539; *Story Parchment Co.* v. *Paterson Co.,* 282 U.S. 555, 560, 567-568. But since attention was centered on the issues which we have discussed, the remaining questions were not fully presented to this Court either in the briefs or oral argument. In view of these circumstances we deem it more appropriate to remand the cause to the Circuit Court of Appeals so that it may pass on the questions reserved. *Lutcher & Moore Lumber Co.* v. *Knight,* 217 U.S. 257, 267-268; *Brown* v. *Fletcher,* 237 U.S. 583. If any questions of importance survive and are presented here, we will then have the benefit of the views of the Circuit Court of Appeals. Until that additional consideration is had, we cannot be sure that it will be necessary to pass on any of the other constitutional issues which respondents claim to have reserved.

See also *Dandridge* v. *Williams*, 397 U.S. 471, 476, n. 6 ("When attention has been focused on other issues, or when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court"); *Aetna Cas. & Sur. Co.* v. *Flowers*, 330 U.S. 464, 468.

2. Levy argues that "[t]he Government * * * seems to concede that Dr. Levy was not convicted for making 'public' statements" (Appellee Br., No. 73-206, p. 47). The government has made no such concession; indeed the record shows that Levy was convicted of "publicly utter[ing]" disloyal statements. Levy's argument that he might have been convicted for private statements because "the law officer deleted this element from his charge" (Appellee Br., No. 73-206, p. 47) misunderstands both the law officer's charge and the court's findings. The law officer charged that to find Levy guilty the court must find "beyond a reasonable doubt" that, *inter alia*, the statements were "Publicly made" (R. 2594). He then said (*ibid.*):

> If you are not convinced beyond a reasonable doubt that these statements, if any, were made in public, you may nevertheless find the accused guilty by excepting the words "in public" from your findings, provided, of course, you are convinced of his guilt beyond a reasonable doubt of the remaining elements.

The court returned a verdict of "Guilty," without excepting the words "in public" from its findings (R. 2617). It therefore found beyond a reasonable doubt that Levy was guilty, as charged in the specification, of "publicly utter[ing]" disloyal statements. See generally *Manual for Courts-Martial*, 1969 (Revised edition) Para. 74b.

II. *Secretary of the Navy v. Avrech, No. 72-713.*

1. Avrech argues that he may have been convicted of attempting to violate the second clause of Article 134 (prohibiting "all conduct of a nature to bring discredit upon the armed forces") because the specification did not in terms allege that his disloyal statements were "to the prejudice of good order and discipline," as provided in the first clause of the Article (Appellee Br., No. 72-1713, pp. 11, n.12, 12).[1] No records of the instructions given in *Avrech* exist today, so we cannot be sure that they did not include a reference to the second as well as the first clause. It seems clear, however, that Avrech was convicted of attempting to violate the first clause of Article 134.

In the first place the specification charged that Avrech attempted to publish his statements "to members of the Armed Forces of the United States * * * with design to promote disloyalty and disaffection among the troops" (App., No. 72-1713, p. 3). The convening authority in drafting the charge thus specifically avoided any mention of promoting disloyalty and disaffection among the "civilian populace," an alternative form of charge suggested in the model specification (see U.S. Br., No. 72-1713, p. 13a).

Avrech's attempted publication took place at Marble Mountain Air Facility, at Danang, in Vietnam, while he was on active duty in a combat zone. The intended recipients of his publication were, according to both the charge (*supra*) and Avrech's own testimony (Appellee Br., No. 72-1713, p. 5), other servicemen. Such conduct

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[1]We note that the specification against Levy did in terms charge that the disloyal statements were "to the prejudice of good order and discipline in the armed forces" (App., No. 73-206, p. 7).

does not fall within the service-discrediting clause, but rather is governed by the clause dealing with prejudice to good order and discipline. Thus in *United States* v. *Gray*, 20 U.S.C.M.A. 63, 67-68, 42 C.M.R. 255, 259-260, where the defendant was convicted of making a disloyal statement, the court made it clear that the service-discrediting provision did not apply: "Since the statement was published on a military reservation and only military persons were involved, the evidence must establish 'reasonably direct and palpable' prejudice to good order and discipline." This conclusion in *Gray* was based upon the holding of *United States* v. *Snyder*, 1 U.S.C.M.A. 423, 4 C.M.R. 15. In *Snyder* the court held that enticing a woman in the service to engage in sexual intercourse violated the first clause of Article 134. The court said (1 U.S.C.M.A. at 425, 4 C.M.R. at 17): "[S]ince the alleged misconduct transpired in the semi-privacy of a military reservation, the second [service-discrediting] category need not detain us at length." See also, *United States* v. *Kirksey*, 6 U.S.C.M.A. 556, 20 C.M.R. 272; *United States* v. *Cummins*, 9 U.S.C.M.A. 669, 26 C.M.R. 449.

2. Relying on *Stolte* v. *Laird*, 353 F. Supp. 1392 (D.D.C.), Avrech contends that the "disloyal statement specification is itself unconstitutionally vague and overly broad (Appellee Br., No. 72-1713 pp. 48-49, 53-63). In this connection Avrech asserts (Appellee Br., No. 72-1713, p. 48) that the Court of Military Appeals has "recently held that the requirement of 'direct and palpable' injury does not apply where a serviceman is charged with making disloyal statements." Contrary to this assertion, the military courts have continued to hold that the requirement of "direct and palpable" prejudice applies to disloyal statements, as well as all other offenses under the General Article. In *United*

*States* v. *Gray, supra,* and *United States* v. *Priest,* 21 U.S.C.M.A. 564, 45 C.M.R. 338 on which Avrech relies, the military court did not abandon the traditional requirements, but simply reaffirmed the rule that disloyal statements can directly and palpably prejudice good military order and discipline without successfully propagating disloyalty. *United States* v. *Batchelor,* U.S.C.M.A. 354, 22 C.M.R. 144. In accordance with these principles, the government must prove, *inter alia,* that the alleged statements had a clear and reasonable tendency to promote disloyalty and disaffection among the troops, and that such conduct was "directly and palpably" prejudicial to good order and discipline in the Armed Forces.[2]

Respectfully submitted.

ROBERT H. BORK,
*Solicitor General.*

**February 1974**

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[2]In discussing the "disloyal statements" specification, Avrech suggests that the offense is a new one under the General Article, first added in the 1951 Manual (Appellee Br., No. 72-1713, pp. 25, 54). Such misconduct, however, has long been at the core of that Article's proscription. For example, Winthrop cites early cases construing the Article to forbid "[e]xpressing sentiments disloyal to government and in sympathy with the enemy." *Military Law and Precedents,* 728, n. 22 (2d ed., 1920).

No. 72-1713

Mar. 18, 1974 - Supplemental brief for appellant and supplemental brief for appellee, after argument, filed. NOT PRINTED.

(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

# SUPREME COURT OF THE UNITED STATES

No. 72–1713

| | |
|---|---|
| Secretary of the Navy, Appellant, *v.* Mark Avrech. | On Appeal from the United States Court of Appeals for the District of Columbia Circuit. |

[July 8, 1974]

PER CURIAM.

Appellee Mark Avrech was convicted by a special court-martial on charges of having violated Art. 80 of the Uniform Code of Military Justice, 10 U. S. C. § 880. The specification under Art. 80, which punishes attempts to commit offenses otherwise punishable under the U. C. M. J., charged an attempt to commit an offense under the first and second clauses of Art. 134, 10 U. S. C. § 934, namely, an attempt to publish a statement disloyal to the United States to members of the Armed Forces "with design to promote disloyalty and disaffection among the troops."

Upon conviction, appellee was sentenced to reduction in rank to the lowest enlisted grade, forfeiture of three months' pay, and confinement at hard labor for one month. The commanding officer suspended the confinement, but the remainder of the sentence was sustained by the Staff Judge Advocate and the Judge Advocate General of the Navy. Appellee was subsequently given a bad-conduct discharge after an unrelated second court-martial conviction.

In December 1970, appellee brought this action in the United States District Court for the District of Columbia,

asserting jurisdiction under 5 U. S. C. §§ 701–706, 28 U. S. C. § 1331, and 28 U. S. C. § 1362. He claimed that Art. 134 was unconstitutionally vague and overbroad on its face and as applied, that his statement was protected speech, and that he was convicted without sufficient evidence of criminal intent. He sought an order declaring his Art. 80 conviction invalid and requiring the Secretary of the Navy to expunge any record of his conviction and to restore all pay and benefits lost because of the conviction. After the District Court denied relief, the Court of Appeals reversed, holding that Art. 134 is unconstitutionally vague. We noted probable jurisdiction. 414 U. S. 816 (1973). Following oral argument, we directed counsel to file supplemental briefs on the issues of the jurisdiction of the District Court and the exhaustion of remedies.

Without the benefit of oral argument, we are unwilling to decide the difficult jurisdictional issue which the parties have briefed. Assuming *arguendo* that the District Court had jurisdiction under the circumstances of this case to review the decision of the court-martial, our decision in *Parker* v. *Levy*, 417 U. S. — (1974), would require reversal of the Court of Appeals' decision on the merits of appellee's constitutional challenge to Art. 134. We believe that even the most diligent and zealous advocate could find his ardor somewhat dampened in arguing a jurisdictional issue where the decision on the merits is thus foreordained. We accordingly leave to a future case the resolution of the jurisdictional issue, and reverse the judgment of the Court of Appeals on the authority of *Parker* v. *Levy*, *supra*. See *United States* v. *Augenblick*, 393 U. S. 348 (1969); *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 249 (1973).

# SUPREME COURT OF THE UNITED STATES

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MR. JUSTICE STEWART, concurring in the result.

I indicated my view in *Parker* v. *Levy*, 417 U. S. —, —, that Art. 134 of the Uniform Code of Military Justice, 10 U. S. C. § 934 (1970), is unconstitutionally vague. However, my views did not prevail in *Parker*, where the Court upheld the military General Articles against constitutional attack. Given that result, which controls the merits of the appellee's substantive claims here, I agree that it would be inappropriate to require further argument of the jurisdictional issues in this case. Consequently, I am content to leave those issues for another day, and concur in the judgment of the Court.

# SUPREME COURT OF THE UNITED STATES

No. 72-1713

| | |
|---|---|
| Secretary of the Navy, Appellant, v. Mark Avrech. | On Appeal from the United States Court of Appeals for the District of Columbia Circuit. |

[July 8, 1974]

MR. JUSTICE DOUGLAS, dissenting.

Respondent was convicted of an attempt to publish a statement disloyal to the United States to members of the armed forces "with design to promote disloyalty and disaffection among the troops." Article 80 of the Uniform Code of Military Justice, 10 U. S. C. § 880, covers the attempt and Art. 134, 10 U. S. C. § 934, covers the substantive offense.

Respondent was on active duty in Vietnam in a combat zone and like most soldiers on night duty had a lot of time on his hands. He typed the following statement:

> "It seems to me that the South Vietnamese people could do a little more for the defense of their country. Why should we go out and fight their battles while they sit at home and complain about communist aggression. What are we, cannon fodder or human beings? The United States has no business over here. This is a conflict between two different politically minded groups. Not a direct attack on the United States. We have peace talks with North Vietnam and the V. C. That's just fine and dandy except now how many men died in Vietnam the week they argued over the shape of the table? . . . Do we dare express our feelings with the threat of court-martial perpetually hanging over our heads? Are your opinions worth risking a

court-martial? We must strive for peace and if not peace then a complete U. S. withdrawal. We've been sitting ducks for too long. . . ."

His plan was to have the mimeograph operator make copies which he could distribute. But the operator instead turned it over to a superior officer and a court-martial followed. Respondent, a private first class, was reduced to the lowest enlisted grade, deprived of three months' pay, and confined for one month to hard labor. The commanding officer suspended the confinement and the remainder of the sentence was sustained on review. This suit, asserting federal rights, was brought in that, among other things, he was punished for protected speech. I think that claim has merit; and I would affirm the Court of Appeal. See 414 U. S. 816.

Soldiers, lounging around, speak carefully of officers who are within earshot. But in World War I we were free to lambast General "Black Jack" Pershing who was distant, remote, and mythical. We also groused about the bankers' war, the munitions makers' war in which we had volunteered. What we said would have offended our military superiors. But since we could write our Congressmen or Senators about it, we saw no reason why we could not talk it out among ourselves.

Talk is of course incitement; but not all incitement leads to action. What respondent in this case wrote out with the purpose of showing to the Marines in his unit, might, if released, create only revulsion. Or it might have produced a strong reaction. Conceivably more might have shared his views. But he was not setting up a rendezvous for all who wanted to go AWOL nor laying a dark plot against his superior officers. He was attempting to speak with his comrades in arms about the oppressive nature of the war they were fighting. His attempt, if successful, might at best result in letters to

his family or Congressman or Senators who might read what he said to local people or publish the letters in newspapers or make them the subject of debate in legislative halls.

Secrecy and suppression of views which the Court today sanctions increases rather than repels the dangers of the world in which we live. I think full dedication to the spirit of the First Amendment is the real solvent of the dangers and tensions of the day. That philosophy may be hostile to many military minds. But it is time the Nation made clear that the military is not a system apart but lives under a Constitution that allows discussion of the Great Issues of the day, not merely the trivial ones—subject to limitations as to time, place, or occasion but never to control.

The steps we take in *Parker* v. *Levy* and in this case are backward steps measured by the standards of an open society.*

I dissent from a reversal of this judgment.

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*J. Robert Oppenheimer, cruelly cast into the outer darkness by AEC in its notorious "witch hunt," said on Edward R. Murrom's TV show "See It Now" in January 1955:

"The trouble with secrecy is that it denies to the government itself the wisdom and the resources of the whole community, of the whole country, and the only way you can do this is to let almost anyone say what best meditations of technical things that you can, and to let men deny what they think is false—argue what they think is false, you have to have a free and uncorrupted communication.

"And this is—this is so the heart of living in a complicated technological world—it is so the heart of freedom that that is why we are all the time saying "Does this really have to be secret?" "Couldn't you say more about that?" Are we really acting in a wise way?" Not because we enjoy chattering—not because we are not aware of the dangers of the world we live in, but because these dangers cannot be met in any other ways.

"The fact is, our government cannot do without us—all of us." The Oppenheimer Case, The trial of a Security System, by Charles P. Curtis, Simon & Schuster, New York, 1955.

# SUPREME COURT OF THE UNITED STATES

No. 72-1713

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|---|---|
| Secretary of the Navy, Appellant, v. Mark Avrech. | On Appeal from the United States Court of Appeals for the District of Columbia Circuit. |

[July 8, 1974]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

The Court's decision in *Parker* v. *Levy*, — U. S. — (1974), establishes that the Court of Appeals erred in overturning respondent's court-martial conviction on the basis of the unconstitutional vagueness of Art. 134. In these circumstances, I agree that this case does not present an appropriate vehicle for this Court's consideration of the substantial jurisdictional issues presented. Respondent also claimed, however, that Arts. 80 and 134, as applied to his case, infringed his First Amendment rights, claims rejected by the District Court but never passed upon by the Court of Appeals because of that court's holding as to the vagueness of Art. 134. See *Avrech* v. *Secretary of Navy*, — U. S. App. D. C. —, —, 477 F. 2d 1237, 1239 (1973). I think it inappropriate for this Court to pass on these claims without the benefit of the Court of Appeals' consideration in the first instance. I would therefore vacate the judgment of the Court of Appeals and remand for reconsideration of the jurisdictional questions and the merits in light of *Parker* v. *Levy*.

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In The

# Supreme Court of the United States

October Term, 1974

No. 72-1713

SECRETARY OF THE NAVY,

*Appellant,*

v.

MARK AVRECH,

*Appellee.*

On Appeal From The United States
Court of Appeals For The District Of Columbia Circuit

## PETITION FOR REHEARING

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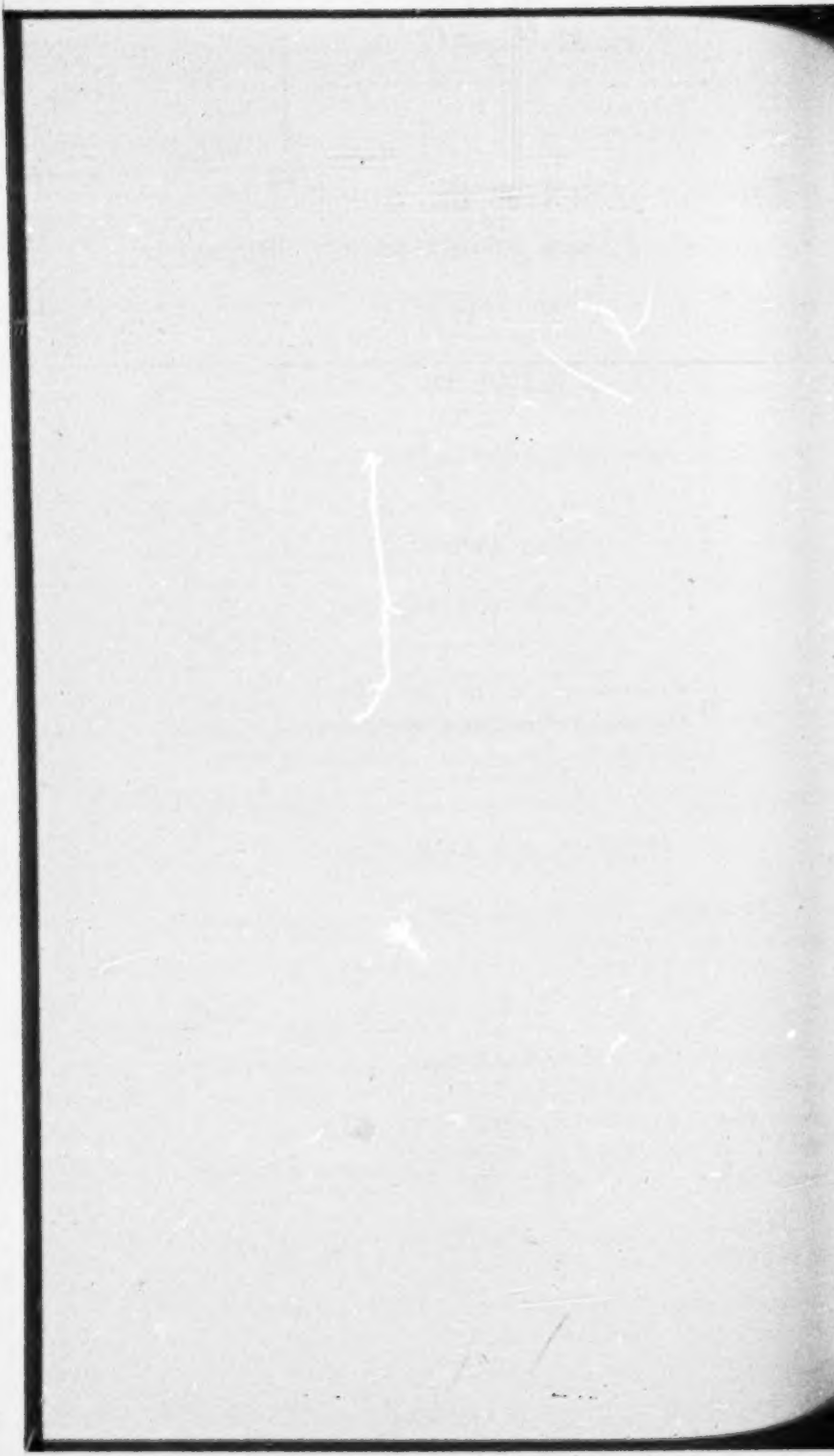

# Supreme Court of the United States

October Term, 1974

No. 72-1713

SECRETARY OF THE NAVY,

*Appellant,*

v.

MARK AVRECH,

*Appellee.*

On Appeal From The United States
Court of Appeals For The District Of Columbia Circuit

## PETITION FOR REHEARING

The appellee, Mark Avrech, petitions for rehearing for the reasons hereinafter stated.

### I.

Assuming the correctness of the Court's opinion in *Parker v. Levy*, — U.S. —, 42 U.S.L.W. 4979 (June 18, 1974), that opinion does not justify the Court's statement in the instant case (slip op., p. 2) that that decision governs here and requires reversal of the Court of Appeals' decision below.

In *Parker v. Levy* this Court's holding was premised upon the fact that the Court of Military appeals had construed Article

134 as being limited to "calls for active opposition to the military policy of the United States" and did not reach all "disagreement with, or objection to, a policy of the government." Accordingly it upheld the conviction in that case because the Article was applied to conduct of a "commissioned officer [who was] publicly urging enlisted personnel to refuse to obey orders which might send them into combat." 42 U.S.L.W. 4987-4988. Appellee's attempted speech here has none of those characteristics. On the contrary:

1. Appellee was an enlisted man, not a commissioned officer.

2. Appellee did not, in any sense, urge anyone to disobey orders.

3. The statement appellee attempted to make can not be considered, under any construction, to be any more than a "disagreement with, or objection to, a policy of the government." *United States v. Harvey*, 19 U.S.C.M.A. 539, 544, 42 C.M.R. 100 (1971).

Since the Court in *Levy* upheld the validity of Article 134 on the ground that the Court of Military Appeals had construed the Article as not covering statements of the character made by the appellee here, there is absolutely no justification for the Court's statement in its *per curiam* opinion that the decision in *Levy* requires reversal of the Court of Appeals here. On the contrary, the logical implication of *Levy* is that the decision of the court below here should be upheld.

## II.

We believe, in any event, that the Court's decision in this case requires clarification. In the court below, we advanced three separate grounds for reversing the appellee's conviction:

1. That Article 134 was invalid on vagueness and overbreadth grounds.

2. Assuming the validity of Article 134, that the specification under which the appellee was charged was invalid. See *Stolte v. Laird*, 353 F.Supp. 1392 (D.C.D.C. 1973).

3. That appellee's attempted speech was protected by the First Amendment.

Since the Court of Appeals decided the first issue in appellee's favor it expressed no views on the second and third grounds[1] raised by the appellee. Accordingly these questions still remain open and appellee should have an opportunity to have them resolved at some appellate judicial level. As matters now stand, the Court of Appeals has never considered these questions and neither has this Court.

We can assure the Court that we welcome the opportunity to argue these questions before the Court and at the same time fully brief and argue the jurisdictional issue in the case with undampened ardor. Alternatively, we request that this Court remand to the Court of Appeals with explicit directions to consider the questions left open.

## III.

Finally, we believe that *Parker v. Levy*, *supra*, was wrongly decided. This Court upheld Article 134 of the Uniform Code of Military Justice, 10 U.S.C. §934, finding that although there were "sizable areas of uncertainty as to the coverage" of the Article there was, nevertheless, "a substantial range of conduct" to which the Article applied "without vagueness or imprecision." 42 U.S.L.W. at 4986. Accordingly this Court rejected the argument that Article 134 set forth "no standard of conduct,"

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1. Unlike the Court of Appeals for the Third Circuit which found, according to this Court, 42 U.S.L.W. at 4986, that Levy's conduct was covered by Article 134, the Court of Appeals here made no such finding with respect to the appellee's attempted statement.

*Coates v. Cincinnati*, 402 U.S. 611, 614 (1971) and held that the Article was not vague.

We submit that whatever may have been presented to the Court in the briefs in *Parker v. Levy*, the appellee's brief on the merits in the instant case and the discussion of Justice Clark in the Court of Appeals amply demonstrate that Article 134 is precisely that type of statute which specifies "no standard of conduct" and hence is vague. In finding otherwise the Court totally ignored the language of the Article (Appellee's Br., pp. 10-14), its English history (Appellee's Br., pp. 14-17) and its American legislative history (Appellee's Br., pp. 17-22).[2] Moreover the Court paid little attention to the fact that the military courts have not narrowed the broad reach of the Article (Appellee's Br., pp. 23-26, 47-49).

As stated by Justice Clark below, "Article 134 gives no fair warning of the conduct it proscribes and fails to provide any ascertainable standard of guilt to circumscribe the discretion of the enforcing authorities." 477 F.2d 1237, 1241. Thus contrary to this Court's view, Article 134 presents not merely a case where "difficulty is found in determining whether certain marginal offenses" fall within the Article's language, *United States v. National Dairy Corp.*, 372 U.S. 29, 32 (1963), but rather presents a case of traditional vagueness where a statute fails to proscribe *any* ascertainable standard of conduct at all.[3]

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2. *See*, e.g., the statement of General Crawder, the draftsman of the second clause of Article 134, to the effect that this clause ("all conduct of a nature to bring discredit upon the Armed Forces") was meant to include everything and was similar to the catch-net language of the tariff bills. Br., pp. 18-19.

3. In his concurring opinion in *Levy*, Justice Blackmun stated that Article 134 should be sustained because "times have not changed in the area of moral precepts" and that what is at issue here are "fundamental concepts of right and wrong." 42 U.S.L.W. at 4988. In essence the premise of this view is that Article 134 punishes conduct which is "wrong." We submit that this view should properly result in invalidating the Article for no statute whose references for determining criminality are unwritten "concepts of right and wrong" can pass any rational constitutional test for vagueness, regardless of the area to which the statute is applicable.

Accordingly, what this Court has done in *Parker v. Levy*, despite its rather broad marshalling of irrelevant factors,[4] is to say that so far as the military is concerned, the constitutional doctrine of due process of law has no application at all.

## CONCLUSION

The petition for rehearing should be granted.

Respectfully submitted,

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4. For example, the Court's statement that the Uniform Code of Military Justice permits the imposition under Article 15 of noncriminal sanctions, 42 U.S.L.W. at 4984, is no justification to uphold the validity of Article 134 when that Article has been applied, in the cases of both Levy and Avrech, to impose criminal sanctions.

## CERTIFICATE

I certify that this petition for rehearing is presented i
good faith and not for delay.

DAVID REIN